

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
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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.

RECORD ON APPEAL
VOLUME XI

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

**RECORD ON APPEAL
INDEX**

VOLUME I

ORDERS and JUDGMENT

Order dismissing Defendants dated April 19, 2016	1
Order dismissing Defendant Tamko dated July 20, 2016	17
Form 4 Order and Judgment, September 22, 2016	22
Order denying BFS's September 8, 2016 Motion to Compel and Set-Off November 16, 2017.....	26
Order Denying BFS Motion Rule 59(e) Motion filed June 27, 2018	45

VERDICT FORM

Verdict Form, September 1, 2016	46
---------------------------------------	----

PLEADINGS

One Belle Hall Initial Complaint filed November 19, 2012	48
One Belle Hall First Amended Complaint filed December 31, 2013	65
One Belle Hall Second Amended Complaint filed January 8, 2015	106
One Belle Hall Third Amended Complaint filed February 9, 2015	148
BFS Answer to First Amended Complaint filed January 31, 2014.....	95
BFS Answer to Second Amended Complaint filed January 21, 2015.....	137
BFS Answer to Third Amended Complaint filed March 6, 2015.....	176

TRANSCRIPTS

Trial Transcript August 29, 2016 to September 1, 2016.....	187
August 30, 2016	187

VOLUME II

August 31, 2016	348
September 1, 2016	517
Motions Hearing Transcript November 18, 2016	745

VOLUME III

Motions Hearing Transcript April 20, 2017.....	806
Richard Woodward Deposition read at Trial.....	874
Mark Galvin Deposition Excerpts read at Trial	1070

VOLUME IV

EXHIBITS/DOCUMENTS

Exhibit 44 – OBH Window Purchase Order w/ April K	1101
Exhibit 44a – OBH Window Purchase Order w/ May K	1106
Exhibit 82 – ESP Install Instructions	1110
Exhibit 82.1 – ESP 2031 Install Instructions.....	1112
Exhibit 82.2 – ESP 2041 Install Instructions.....	1114
Exhibit 82.3 – NCTL ESP 2031/2042 Test Report	1116
Exhibit 82.5 – Keystone Certifications.....	1122
Exhibit 82.6 – ESP 2031/2041 Window Label	1124
Exhibit 129 – Galvin Window Photos	1125
Exhibit 130 – Wilson Window Photos	1133
Exhibit 179 – HO Operations and Maintenance Manual	1139

VOLUME V

Exhibit 179 – HO Operations and Maintenance Manual – continued.....	1599
Exhibit 188 – Homeowners Manual and Warranty Book	1851

VOLUME VI

Exhibit 188 – Homeowners Manual and Warranty Book continued	2100
Exhibit 300.5 – WDP Final Report with Repair Recommend	2156
Exhibit 301 – WPD Final Report Appendix One.....	2317

VOLUME VII

Exhibit 301 – WPD Final Report Appendix One – continued	2595
---	------

VOLUME VIII

Exhibit 301 – WPD Final Report Appendix One – continued	3091
Exhibit 302 – WPD Final Report Appendix Two	3242

VOLUME IX

Exhibit 302 – WPD Final Report Appendix Two - continued	3592
---	------

VOLUME X

Exhibit 302 – WPD Final Report Appendix Two - continued	4078
Exhibit 304.3 – Moore Final Repair Est.	4214
Exhibit 305 – Rogers Rimkus Report	4258
Exhibit 325a-g – Watkins 7 Estimates.....	4314
Exhibit 325h – Watkins Latest Estimate	4331
Exhibit 327a – Window Submittal Summary.....	4332
Exhibit 333 – Window Submittal.....	4334
Exhibit 420 – Window Photo w/ ESP Sticker.....	4355
Exhibit 637 – Items Not included in Watkins Latest Estimate	4356
Exhibit 699 – Assignment	4358
Exhibit 700 – Resolution re: Assignments.....	4423
Def Exhibit 1 – Meek Purchase Agreement	4425
Def Exhibit 214 – Terradista Purchase Agreement	4455

VOLUME XI

OTHER MOTIONS

BFS Motion in Limine, dated August 28, 2016	4485
---	------

BFS Notice of Motion and Motion to Compel and Motion for Determination of Set-Off, filed September 8, 2016.....	4492
--	------

BFS Motion for Judgment, New Trial Absolute, or in the alternative, for New Trial <i>Nisi Remittitur</i> , filed September 13, 2016	4494
--	------

One Belle Hall Memorandum in Opposition to BFS Motion for JNOV, New Trial Absolute, or, in the alternative New Trial <i>Nisi Remittitur</i> , filed November 16, 2016	4507
A. 8/30 and 9/1/2016 Trial Transcripts ... 220,224-231,624-627,636,644-694,699	
B. 9/1/16 Dyer Email	4536
C. Verdict Form	46
D. Form 4.....	22
E. Notice of Entry of Filing Form 4	4538
Appendix A – Ambruoso v. Lee (unpublished case)	4540

One Belle Hall Memorandum in Opposition to BFS Motion to Compel, and Motion for Setoff, filed November 16, 2016.....	4544
A. BFS Motion in Limine	4485
B. 8/30 and 9/1/ 2016 Trial Transcript Excerpts.....	
..... 220,224-231,624-627,636,644-694,699	
C. 9/1/16 Dyer Email	4536

D. Verdict Form	46
E. 9/7/16 Dyer Letter to Clerk	4574
F. Form	22
G. Notice of Entry of Form 4	4538
H. Atkinson Order	4576
 BFS Memorandum in Support of Def's Motion to Compel Production of Settlement Agreements and Motion for Setoff, dated November 17, 2016	 4581
 BFS Memorandum in Support of Def's Motion for JNOV, New Trial, New Trial Absolute, or in alternative for New Trial <i>Nisi Remittitur</i> , filed November 21, 2016	 4587
 BFS Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff, filed November 21, 2016	 4603
 One Belle Hall Supplemental Memorandum of Law in Opposition to BFS Motion to Compel and Motion for Setoff, dated April 19, 2017	 4609
 BFS Supplemental Memorandum with remaining grounds for consideration of BFS's In post-trial motion, filed April 19, 2017	 4618
 BFS Motion to Alter or Amended the Court Order Denying Set-Off, filed December 11, 2017	 4624
 One Belle Hall Motion to Dismiss BFS Appeal, filed December 11, 2018	 4649
Exhibit A – Excerpts of Trial Transcript	220,224-231,624-627,636,644-694,699
Exhibit B - 11/16/17 Order Denying BFS September 8, 2016 Motion to Compel and Motion for Determination of Setoff	26
Exhibit C – 9/1/16 Verdict Form	46
Exhibit D – BFS Motion to Compel and Motion for Determination of Setoff	4492
Exhibit E – 9/7/16 BFS Motion to Compel and Motion for Determination of Setoff Cover letter	4671
Exhibit F – 9/12/16 BFS Motion for Judgment, New Trial Absolute, or, in the Alternative, for New Trial <i>Nisi Remittitur</i>	4494
Exhibit G - 9/22/16 Form 4 – Final Order	22
Exhibit H – 9/27/16 Notice of Order/Jury Verdict for Plaintiff	4538
Exhibit I - 11/16/16 Plaintiffs' Memorandum in Opposition to Def BFS Motion for JNOV, New Trial Absolute, or, in the Alternative New Trial <i>Nisi</i> Remittitur	4507
Exhibit J – 11/16/16 Plaintiffs' Memorandum of Law in Opposition to BFS Motion To Compel and Motion for Setoff	4544
Exhibit K – 11/16/16 BFS Memorandum in Support of its Motion for JNOV, New Trial, New Trial Absolute, or in the Alternative, for New Trial <i>Nisi</i> Remittitur	4587

Exhibit L - 11/17/16 BFS Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff	4603
Exhibit M - Excerpts of Post-Trial Hearing Transcript.....	745
Exhibit N - 4/18/17 BFS Supplemental Memorandum with remaining grounds for Consideration in BFS post-trial motion.....	4618
Exhibit O - 4/20/17 Plaintiffs' Supplemental Memorandum to BFS Motion to Compel and Motion for Setoff	4609
Exhibit P - 12/11/17 BFS Motion to Alter or Amend Court's Order Denying Setoff	4624
Exhibit Q - Order denying BFS Motion to Alter or Amend	26
Exhibit R - 6/29/18 BFS Notice of Appeal	4673
Exhibit S - 7/2/18 BFS Notice of Appeal, received by SC Court of Appeals	4676

MISCELLANEOUS

BFS Counsel Email Consenting to Verdict Form dated September 1, 2016.....	4670
BFS Motion to Compel Cover Letter dated September 7, 2016	4671
Notice of Order/Jury Verdict dated September 27, 2016	4672
BFS Served Notice of Appeal filed June 29, 2018	4673
1. Form 4 and Verdict Form	22,46
2. Notice of Entry of Judgment and Order	4671
3. 6/27/16 Order	45
BFS Filed Notice of Appeal July 2, 2018	4676
1. Form 4 and Verdict Form	22,46
2. Notice of Entry of Judgment and Order	4671
3. 6/27/16 Order	45

VOLUME XII

All Settlement Agreements with Co-Defendants Produced to BFS (pursuant to a motion to file under seal).....	4678
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Certificate of Counsel

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.)

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 FirstSource –)
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)

**DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC'S MOTION
IN LIMINE**

Services, Inc.; General Heating & Air)
 Conditioning Company of Greenville, Inc.)
 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.; 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, d/b/a Wholesale)
 Building Products; and What Don't We Do;)
)
 Defendants.)
)

PLEASE TAKE NOTICE that Defendants Builders FirstSource-Southeast Group, LLC
 ("BFS"), by and through their undersigned attorney, will move before the Presiding Judge of the
 Ninth Judicial Circuit, Charleston County Courthouse, South Carolina, at such place, date, and
 time as the Court may appoint, for an Order granting the following Motion in Limine, and in
 support thereof, aver as follows:

A. Exclude or Limit Evidence or Testimony

BFS requests that the Court order Plaintiff, Plaintiff's attorneys, and all other persons
 involved in this case on behalf of Plaintiff, whether as witnesses or experts (collectively

"Plaintiff Group"), be instructed not to mention or bring before the jury, whether in voir dire, opening statements, interrogation of witnesses, argument, objections, closing argument, or any other means or manner, any of the matters set forth in the paragraphs below, unless and until such matters have been called to the Court's attention, out of the presence of the jury, and a favorable ruling has been received as to the admissibility and relevance of such matters.

BFS further requests that the Court order that the below matters are generally inadmissible, irrelevant, highly prejudicial, and the introduction of such would deny BFS the right to a fair trial, even if a timely objection was made and sustained.

1. Plaintiff Group shall not mention, remark, reference, inquire, or introduce evidence about liability insurance. The issue of whether BFS is protected by liability insurance is immaterial to any issue before the jury, would be prejudicial, and is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. Rules 401, 402, 403; 411, SCRE.

2. Plaintiff Group shall not suggest or ask jurors to place themselves in the position of Plaintiff or the homeowners. Such a request is an improper appeal to the passions and sympathies of the jurors. *Branham v. Ford Motor Co.*, 390 S.C. 203, 234, 235 (2013).

3. Plaintiff Group shall not mention, remark, reference, inquire, or introduce evidence regarding any settlement demands, offers, or negotiations between the parties. Such evidence is inadmissible to prove liability for or invalidity of the claim or its amount. Rule 408, SCRE.

4. Plaintiff Group shall not mention, remark, reference, inquire, or introduce evidence of any prior action and/or omission on the part of BFS that is not directly related to the incident and allegations at issue. Such evidence is not admissible because it is not relevant, it is

prejudicial, and it cannot be used to prove that a person acted in conformity with a particular trait. Rules 401, 402, 403, 404, 406 SCRE. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. Rule 404(b), SCRE, further clarifies the types of evidence that will be excluded if offered solely "to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. In addition, this evidence fails to meet admissibility standards under Rule 406, SCRE. "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Rule 406, SCRE.

5. Evidence of punitive damages before BFS's liability is established should be precluded because punitive damages cannot be awarded unless actual damages are awarded. *Keané v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148-149 (2007). Specifically, BFS requests that the Court prohibit Plaintiff Group from presenting evidence related solely to punitive damages, such as net worth and financial condition, and be prohibited from making any mention of punitive damages during the first phase of the trial. South Carolina Code §15-32-520.

Further, BFS requests punitive damages be conducted in a bifurcated trial in accordance with South Carolina Code §15-32-520.

6. Robert Lanier is a fact witness anticipated to testify at trial during BFS' case in

chief and his deposition testimony should not be published to the jury during Plaintiff's case in chief. Plaintiff has offered notice of its intention to publish the testimony of Robert Lanier to the jury. Robert Lanier is a retired employee and occasional consultant for BFS. He has been identified as a fact witness and BFS intends to call him for testimony at trial. Moreover, Plaintiff's counsel has served upon Mr. Lanier a trial subpoena, without notice to the undersigned, requiring his presence at the Courthouse on Monday, August 29th and thereafter as necessary indicating Plaintiff intends to call Mr. Lanier as a witness. Under SCRCF Rule 32, depositions may be used at trial under a number of circumstances, which are inapplicable here. Mr. Lanier was not the Rule 30(b)(6) representative of BFS, he is not a party and he is not indisposed or unavailable to testify at trial. His deposition testimony may be used for purposes of impeachment, but his testimony should be solicited on the witness stand at trial.

7. Plaintiff's Request for Admission of Authenticity of documents relative to two different construction projects under litigation and the documents contained therein are unduly burdensome, irrelevant and prone to cause confusion among the jury. On August 24, 2016, Plaintiff served Request for Admission of Authenticity containing 230 pages of documents related to a condominium project identified as "Parkside." On August 25, 2016, Plaintiff served Request for Admission of Authenticity containing additional documents for review and authentication related to yet another development project identified as "Pierview." SC Code §19-1-60 applies to "any paper material to the action." Plaintiff's counsel has pending litigation related to both the Parkside and Pierview developments in which BFS has not yet been joined as a Defendant. The purpose of §19-1-60 is not to allow counsel to authenticate documents that will certainly be relevant in other lawsuits as a means to shortcut the discovery process. Additionally, the four day response time under the Code is an unreasonable an unduly burdensome on BFS.

Using this mechanism, Plaintiff has proffered previously undisclosed documents during the pendency of the present litigation. BFS is not able to adequately research and review documents related to a job it may have been involved in ten years ago within four days. Moreover, the involvement of BFS as a material supplier or otherwise on condominium projects other than the one at issue in the trial is irrelevant and may confuse the jury.

B. Apportionment of Damages

Should it be found that BFS is liable in this case, which it disputes, damages applicable to the BFS are clearly divisible from all other damages at the project (i.e. damages related to roofs, HVAC, electrical, plumbing, etc.). BFS cannot be held jointly and severally liable for any all-encompassing damages awarded to Plaintiff.

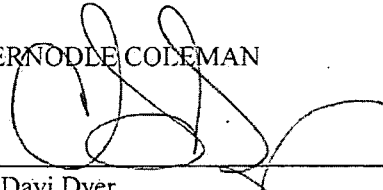
C. Conclusion

Finally, BFS requests that the Court order that the violation of this order would constitute harm and deprive BFS of a fair and impartial trial, and instruct Plaintiff's attorneys that the failure to abide by such an order may constitute contempt and necessitate a declaration of a mistrial.

Signature block on next page.

KERNODLE COLEMAN

By:


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ATTORNEYS FOR BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC

August 28 2016

Charleston, South Carolina

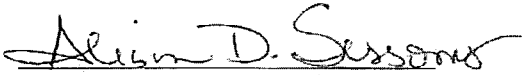
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of *Builders FirstSource-Southeast Group, LLC Motion in Limine* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class, to:

Justin O. Lucey, Esquire
Dabny Lynn, Esquire
Justin O'Toole Lucey, PA
P. O. Box 806
Mt. Pleasant, SC 29465

Attorney for Plaintiff

August 28 2016


Alison D. Sessoms

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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.

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

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

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.

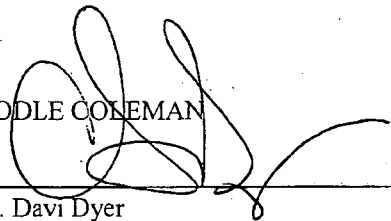
Beginning on August 29, 2016 a jury trial was held with Judge Goodstein presiding, which
resulted in a September 1, 2016 verdict in favor of Plaintiff in the amount of \$2,163,000.00 on the
breach of express and implied warranties and strict liability causes of action.

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

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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

By: 

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ATTORNEY FOR DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC

August 7, 2016

Charleston, South Carolina

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**

2016 SEP 13 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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,

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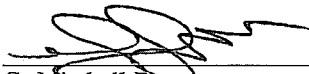
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September 12, 2016

) IN THE COURT OF COMMON PLEAS

) FOR THE NINTH JUDICIAL CIRCUIT

) CASE NO. 2012-CP-10-7594

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JULIE J. ARNOLD

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Like BFS's Second JNOV Motion, BFS's New Trial Motion is procedurally precluded because BFS never requested leave to file this Motion. BFS's New Trial Motion is also substantively without merit given BFS failed to object to practically anything during the trial of this matter and the jury's verdict falls within the range of evidence unchallenged by BFS.

In sum, BFS has nothing to complain about given (1) the consensual manner in which the trial was conducted; (2) its lack of objections to evidence, testimony or jury charges; and, (3) its improperly raised and unsupported arguments. Each of the foregoing reasons independently warrant this Court's denial of both BFS's Second JNOV and New Trial Motions.

PERTINENT BACKGROUND

A.) Trial Specifics

1. Plaintiffs incorporate, by reference, the Pertinent Background section included in Plaintiffs' Memorandum Opposing BFS's Motion to Compel filed simultaneously herewith.

2. Most, if not all, matters related to the four-day trial of this case were consensual in nature. Plaintiffs and BFS submitted a joint voir dire, joint factual statement, joint witness list and joint exhibit list, the majority of which were stipulated to by both Plaintiffs and BFS.

a.) Pre-Trial Motions and BFS's Opening Statement

3. On the first day of trial, August 29th, jury selection occurred followed by the arguing of various trial-related motions presented by both Plaintiffs and BFS.

4. One of these Motions included BFS's Motion for Summary Judgment seeking the dismissal of Plaintiffs' claims based upon the applicable statute of limitation. Finding a question of fact existed as to when Plaintiffs "discovered" their claims, the Court denied BFS's Motion. BFS failed to request the Court reconsider its ruling or otherwise renew its statute of limitation argument at the close of the case.

5. During BFS's opening statement, BFS's counsel proceeds to tell the jury "its side of the story", describing BFS as "a building material supply company [which sells] everything from nails and tile to lumber and, of course, windows" to "larger home builders" including "Trammell Crow Residential,"¹ the developer of OBH and "225,000" similar residential complexes. (Tr. Transcr. 22:7-24:4).²

6. BFS's counsel next informs the jury that "the [OBH] homeowners after moving in sometime in 2007. . . began to experience some problems;" and, as a result, "hired Mr. Lucey's firm who then hires some engineers and experts to come in and really drill down and figure out what is wrong with [OBH]." (Tr. Transcr. 23:4-10).

7. BFS's counsel continues by describing the "myriad of problems found" by Plaintiffs' experts at OBH (including "roof," "stucco," "siding," "wall," "brick," "waterproofing," "window," "flashing," "sealant" and "clearance" problems) and the "14 million dollars [sic] fix" for these problems. (Tr. Transcr. 24:13-25:22).

8. BFS's counsel then explains "as a result of all these findings" and the "cost to fix [OBH]," Plaintiffs "[brought] a lawsuit [in which BFS] is the last defendant left, but there were over 40; over 40 people that [Plaintiffs] blamed for the problems [at OBH] and today [BFS] is the only one left to point the finger to." (Tr. Transcr. 25:24-26:5).

9. BFS's counsel proceeds to "get a little bit further into what [BFS] did with respect to the project", explaining to the jury its "middleman" theme:

You're going to hear about this guy named Larry Bratten [sic]. Now Larry is an independent sales agent. . . He wasn't actually a [BFS] employee, but he brought business to them and was able to kind of broker deals through his customers and [BFS] and one of those customers was [TCR]. So [TCR in 2006] comes to Larry. . . and says we're building a project. The architect has told us we need 324 vinyl ESP [windows]. . . for this project. [We need Larry to] contact the manufacturer and tell

¹ Trammell Crow Residential is hereinafter referred to as "TCR".

² The portions of the Trial Transcript referenced herein are attached as Exhibit "A".

them we need them and we need them sent to this address period; just the middle man. The sophisticated national home builder comes in and says I need 324 of these specific windows and these sizes and I want them [from] the manufacturer and I need them on my job site. Can you get them there? And that's exactly what [BFS] did.

(Tr. Transcr. 26:10-27:8).

10. BFS's then tells the jury BFS's "notice" of the window problems was its receipt of Plaintiffs "lawsuit" and asks the jury to consider "three questions" that "might instruct [it]. . . as to what the right thing to do is:" (1) whether BFS did "anything unreasonable that led to damage to the plaintiffs and, if so, what was that;" (2) whether "BFS [made] a promise that they didn't keep;" and (3) whether "the windows [were] unreasonably dangerous to the buildings." (Tr. Transcr. 27:8-25).

11. BFS concludes its opening statement by (1) listing out multiple parties "who aren't here today" (including "two [window testing] agencies," "the architect," "the general contractor", "the manufacturer," "the framing contractor," and "the delivery guy"); (2) criticizing Plaintiffs' experts' window testing; (3) pointing to OBH's other problems; and (4) repeating its "multiparty" and "middleman" defenses. (Tr. Transcr. 28:22-32:14). As claimed by BFS:

There is too much else going on [at OBH]. These windows don't exist in isolation. These windows exist in buildings that are bad from top to bottom. So if the windows contributed at all to the damage no one is ever going to be able to tell you jurors this is how much damage they caused. So to recap [BFS] they sell the buildings materials. In this particular instance they sold a window package of 324 vinyl ESP windows to a sophisticated national builder [TCR]. [TCR] comes in and says I need this particular window, this many in this size, and I want you to ship it to my job site. That's exactly what [BFS] does. . . [BFS] didn't load them up, they didn't ship them, they didn't deliver them, they didn't unload them. They certainly didn't manufacture them. . . . And they certainly didn't install them. . . . So they are just the middle man. . .

(Tr. Transcr. 31:18-32:14).

b.) Plaintiffs' Case in Chief

12. On August 30th and August 31st, Plaintiffs called OBH POA President, Len Terradista, and BFS employee, Bob Lanier, both of whom testified as to BFS's contractual obligations to One Belle Hall. These contractual obligations, encompassed within a purchase order BFS admittedly agreed to (Jt. Ex. 44(a)) and an express warranty BFS admittedly provided (Jt. Ex. 188), state:

[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee for any costs or expenses attributable to errors in [BFS's] performance.

Jt. Ex. 44(a) (emphasis added).

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.

Jt. Ex. 188 (emphasis added).

13. POA President, Len Terradista, also testified each of the 59 OBH homeowners assigned their individual claims to the POA and the POA formally resolved to represent all homeowners in this matter. (Jt. Exs. 699, 700).

14. Additionally, Plaintiffs called their window expert, Dr. Rhett Whitlock ("Dr. Whitlock"), and BFS's original window expert, David VanDommelen ("VanDommelen"), who opined that the windows supplied by BFS to OBH are leaking and such leakage is "abnormal". Dr. Whitlock elaborated on the windows' defective condition, describing the multitude of water infiltration tests he performed in connection with the windows (all of which failed) and pointing to defects in the manufacture process (lack of continuous seal and cracked miter joints)³ as well as defects in the third-party testing and certification process (different window tested and certified).

³ VanDommelen and TCR's expert, Craig Rogers, also opined the windows contained manufacturing defects. (See VanDommelen Trial Testimony; Jt. Ex. 305).

Both Dr. Whitlock and VanDommelen further opined as to the windows' unreasonably dangerous condition and the damages caused by the leaky windows.⁴

15. Plaintiffs also called Gary Moore ("Moore") as their damages expert. Moore's cost estimate was admitted into evidence and published to the jury. The total repair cost at One Belle Hall is \$14,451,023.34. Moore testified that a "windows-only" replacement cost would total \$3,500,000; the cost to remove and replace the cladding around the Windows, as well as replace the Windows, would be \$4,700,000; and, the cost to repair all consequential damage related to the Windows, remove and repair the cladding around the Windows, and replace the Windows would total approximately \$5,000,000.

16. At no point did BFS object to Dr. Whitlock's, VanDommelen's or Moore's qualification as experts in their respective fields.⁵ BFS also did not object "to evidence of window testing" or "pitting witnesses". (New Trial Mot. at 8).⁶

17. Following Moore's testimony, Plaintiffs called OBH homeowner, Mark Galvin, who testified as to systemic window leaks and extensive termite damage existing throughout OBH, damage particularly localized below windows.

c.) Close of Plaintiffs' Case and Directed Verdict Motions

18. Thereafter, Plaintiffs rested their case⁷ and BFS moved for directed verdict on each of Plaintiffs' claims. (Tr. Transcr. 36:6-39:19).

⁴ BFS's Area Vice President, Bob Lanier, also testified leaky windows are not "quality products" and acknowledged BFS promised to provide "quality products" to OBH. Additionally, Lanier and BFS's 30(b)(6) witness, Richard Woodward, also agreed leaky and non-code compliant windows pose a danger to persons and property.

⁵ Notably, Dr. Whitlock was qualified as an expert as to windows and window testing.

⁶ In fact, Plaintiffs objected to BFS pitting its expert, Drake, against Plaintiffs' expert, Dr. Whitlock. *See* Plaintiffs' Motion to Exclude Drake.

⁷ By the close of Plaintiffs' case, Whitlock's report outlining all "problems" affecting OBH and Moore's repair estimate itemizing the cost to fix each of these problems were jointly stipulated into evidence. In addition, a section of TCR's expert report describing the windows' "manufacturing defect" was jointly stipulated into evidence, along with the results of multiple experts' window testing, expert and homeowner photographs of the windows and resulting

19. As to Plaintiffs' strict liability claim, BFS moved for directed verdict as follows:

[BFS moves for] directed verdict on the cause of action of strict liability. Under the statute code section 15-17-30 it's our position that there has been a failure of proof by the evidence 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. . ."

(Tr. Transcr. 38:15-25).

20. The Court denied BFS' Motion because "taking the evidence in the light most favorable to [Plaintiffs]. . .there is evidence in which the jury can make that determination that these windows pose an unreasonable danger." (Tr. Transcr. 39: 1-6).

21. As to Plaintiffs' breach of warranty claim, BFS moved for directed verdict as follows:

The breach of warranty cause of action we would move for a directed verdict. . .in that there has been insufficient evidence and proof to establish that the windows are in fact a defective condition which would constitute breach of warranty.

(Tr. Transcr. 39:10-15).

22. The Court also denied this Motion, after which BFS indicated it had "no further motions" and proceeded with its case in chief. (Tr. Transcr. 39:16-19).

d.) BFS's Case in Chief and Events Leading Up to Closing Arguments

23. BFS's case in chief consisted of two, newly named expert witnesses: (1) window expert, Phillip Drake ("Drake"), and (2) repair estimator, J.R. Steve Watkins, Jr. ("Watkins"). Drake, who performed no window testing, essentially opined the leaky windows, themselves, minimally contributed to the damage existing at OBH and most were not in need of full

water/termite damage, BFS's signed warranty, BFS's signed purchase order, all homeowner assignments, and the OBH POA's accompanying resolution. (Jt. Exs. 44, 129, 130, 179, 300, 301, 302, 304.3, 305, 699, 700).

replacement. Watkins testified as to a "window-only" estimate he prepared just prior to trial which totaled \$12,000 and only encompassed the removal and resealing of the windows' sill insert.

24. Following Watkins' testimony, BFS rested its case and the Court informed the jury that it had heard all the witnesses and received all the evidence, noting the only items remaining including counsel's closing arguments and jury instructions. (Tr. Transcr. 44:3-44:5).

25. Thereafter, the jury was dismissed and the Court requested the parties proceed with making motions, beginning with Plaintiffs. (Tr. Transcr. 45:6-7).

26. Plaintiffs moved for a directed verdict on each of its three claims, all of which the Court denied. (Tr. Transcr. 46:2-59:10). Notably, when responding to Plaintiffs' directed verdicts motions, BFS's counsel indicated:

And the breach of warranty we would argue that there has been sufficient evidence the windows are defective by manufacturing purposes as opposed to having some kind of damage that the windows arrived on site until the time that they currently exist. We feel that there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination. There is also a question as far as damages go and the damages would be applicable to all three of those causes of action. There is a question on [if] the windows have caused damage then how much damage have the windows caused. . .So we believe there is a question of fact and plenty of evidence that could be weighed either way as to damages which would be applicable to all three causes of action.

(Tr. Transcr. 49:18-51:1) (emphasis added).

27. The Court then requested BFS proceed with its motions to which BFS responded that it had none. (Tr. Transcr. 59:10-11).

28. Prior to recessing for lunch, the Court asked the parties to consider the verdict form and indicated an informal charge conference would occur after the lunch break. (Tr. Transcr. 60:1-25).

29. During this informal conference, the parties agreed to most of the Court-proposed jury charges as well as the submission of an agreed upon general verdict form.⁸

e.) Closing Arguments, Jury Instructions and Verdict

30. Subsequently, both parties gave closing arguments to the jury. Plaintiffs' closing argument highlighted each element of Plaintiffs' claims, reiterated the evidence and testimony demonstrating BFS's liability under these claims, and asked the jury to return a verdict for \$4,700,000.00. (Tr. Transcr. 63:3-99:12).

31. In BFS's closing argument, BFS's counsel repeated its "middleman" and "multiparty" defenses by referencing the "40 plus" defendants no longer in the case, discussing the "comprehensive problems outside window units," and comparing itself to "a pharmacist" merely filing "a prescription." (Tr. Transcr. 94:13-95:7).

32. BFS's counsel also (1) referred to "illegal" windows (Tr. Transcr. 103:2-3) ("If [Dr. Whitlock] is honestly concerned the windows are illegal. . ."); (2) affirmed Dr. Whitlock's expert qualifications (Trial Transcr. 111:17-19) ("Dr. Whitlock is an engineer. He has a very impressive resume. I don't think anybody in the courtroom would question that."); and (3) discussed Dr. Whitlock's window testing (Tr. Transcr. 106:6-14) ("Dr. Whitlock tested 14 windows. . ."); (Tr. Transcr. 109-13:14 ("The leakage at the sill dam we've seen pictures of that.")).

33. BFS's counsel then asked the jury to decide each and every issue BFS now complains about in this Motion:

So as far as the plaintiff with a breach of warranty did [BFS] provide a defective window? Have you seen enough evidence to get as the Judge said past the 50 yard line in this case? Have they met their burden of proof that the window product a) leaks naturally due to rain storms, that the window products, the leaks that were produced during the testing by Dr. Whitlock were traced back directly to the window, the unit itself and not perhaps the surrounding construction – did they

⁸ The parties were given an additional opportunity to read the Court's proposed jury charges and object to any specific charges/modifications they disagreed with after read to the jury.

meet their burden of proof that the leaks at the sill dam were a manufacturing defect? I don't think they did? But you've got all the evidence to consider.

(Tr. Transcr. 110:19-111:5) (emphasis added).

As far as strict liability now this one the words are unreasonably dangerous. That's a pretty extreme classification for a window especially. But strict liability so that's where the product is found to reach the consumer in a condition that was unreasonably dangerous and caused harm. So there has to be damage as well. Now Mr. Woodward in his deposition Mr. Lucey point that out to you, he actually said windows that leak can be unreasonably dangerous. But the question here is are the windows at [OBH] unreasonably dangerous. . .

(Tr. Transcr. 111:6-16) (emphasis added).

Now lets talk about damages because that's really what we are here to talk about. At the end of the day it is all about money in this lawsuit. So each cause of cation requires that you make a direct connection between what [BFS] did wrong, what was unreasonable. Did they break a promise and were the windows delivered in an unreasonably dangerous condition. So what did [BFS] do on this side of the column and can they directly correlate a line, can they draw a line from this side to side saying that whatever [BFS] did or didn't do caused damage.

(Tr. Transcr. 112:13-24) (emphasis added).

Now it is fair to ask [BFS] to bear the cost of a multimillion dollar repair. . Is there enough proof that the windows are defective using any element that has been demonstrated to you? Did [BFS] in selling the product that their sophisticated customer came to them and asked for did they do anything unreasonable?

(Tr. Transcr. 117-21:118:6) (emphasis added).

34. Prior to handing the case over to the jury, the Court asked each party if it had any exception to the charge as given as well as the verdict form. BFS counsel made no objections to the jury charges⁹ and made no objection to the format or content of the final verdict form.¹⁰

36. The Court then read the jury charge, after which Plaintiffs objected to two charges of note: (1) the charge related to any "notice" required for breach of warranty; and (2) the charge

⁹ Notably, the jury charges included charges relating to (a) the Statute of Limitations; (b) Proximate Causation; (c) Concurrent Causation; (d) Intervening Acts of Third Parties; (e) Damage Mitigation; and (f) Expert Witnesses, all without BFS objection. Plaintiffs' copy of these charges are available for review.

¹⁰ BFS's e-mail consenting to the general verdict form is attached hereto as Exhibit "B".

related to the applicable statute of limitations as to implied warranties. The Plaintiffs informed the Court that no notice was required for purposes of breach of warranty and that the applicable statute of limitations for breach of implied warranty is six years opposed to three years. The Court agreed to amend these charges and instructed the jury accordingly. BFS made no objection.

36. Following the reading of the amended jury charges and several hours of deliberation, the jury returned a general verdict in favor of Plaintiffs in the amount of \$2,163,493¹¹ on Plaintiffs' breach of warranty and strict liability causes of action.¹²

C.) Post-Trial Motions

38. Following the jury's verdict, BFS made a Motion for Judgment Notwithstanding the Verdict ("First JNOV Motion") which was subsequently denied. (Tr. Transcr. 129:6-12).¹³ BFS presented no other post-trial motions at the conclusion of trial.

39. On September 7, 2016, BFS filed its Motion to Compel.

40. On September 12, 2016, following the denial of its First JNOV Motion and without seeking leave of Court, BFS filed a Second JNOV Motion as well as a Motion for a New Trial. (See Second JNOV Motion and New Trial Motion).

41. On September 22, 2016, this Court issued a Form 4 Order¹⁴ 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.

¹¹ The verdict form is attached hereto as Exhibit "C".

¹² The jury found that BFS was not liable in negligence.

¹³ After making its JNOV Motion immediately following the return of the jury's verdict, BFS attempted to "renew [its] grounds for the directed verdict motion previously head by the Judge." (Tr. Transcr. 129:3-5). BFS's attempt to renew its directed verdict motions after the verdict is erroneous – BFS should have renewed its directed verdict motion at the close of all evidence, which BFS did not do.

¹⁴ The Court's Form 4 Order is attached hereto as Exhibit "D".

42. On September 27, 2016, this Court mailed a notice informing all parties of the entry of its Form 4 Order.¹⁵

43. To date, BFS has yet to file a Motion to Alter or Amend this Order or any other decree issued by the Court before or during trial.

APPLICABLE LEGAL PRINCIPLES

A.) Judgment Notwithstanding the Verdict

A properly made directed verdict motion is a necessary precursor to any JNOV Motion. In other words, a JNOV Motion allows the Court to reconsider its ruling on a directed verdict motion, but the Court's consideration is limited to the grounds argued for directed verdict. Rule 50(b), SCRPC. Thus, where no directed verdict motion is made at the close of all evidence, no JNOV motion can follow. *RFT Mgmt. Co., LLC v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) ("When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV."). Moreover, issues not raised or not ruled upon by the Court may not be later raised in a post-trial motion for JNOV or otherwise. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (noting a party may not use a post-trial motion to raise an issue that could have been raised at trial).

In otherwise ruling on a properly-made JNOV Motion, the Court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the Court must view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the non-moving party. *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004); *Small v. Pioneer*

¹⁵ The mailed notice regarding the entry of the Court's Form 4 Order is attached hereto as Exhibit "E".

Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). The Court is only concerned with the existence of evidence, not its weight, and the Court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Thus, the Court must deny a motion for JNOV when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Similarly stated, the Court should uphold a jury's verdict if there is any evidence to sustain it. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

B.) New Trial Absolute and New Trial Nisi Remittur

Unlike motions for JNOV, new trial motions assume the existing evidence presents questions reserved for the jury's determination; but, ask whether, in light of all the evidence, the jury reached the appropriate result. Thus, in ruling on new trial motions, the Court, as the "thirteenth juror", has the discretionary power to deny a new trial absolute or *nisi remittitur* if the Court agrees with the jury's verdict based upon the law and the facts, evidence and testimony presented at trial. Rule 59, SCRPC; *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975); *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (noting the trial court's discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them. . . ."); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (noting the grant or denial of new trial motions rests within the trial court's discretion, and the court's decision will not be disturbed on appeal unless

the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law).

A Court may grant new trial motions only when there is prejudicial error in the admission of evidence or if the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802; 805 (1993); *see also O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (finding new trial motions can only be granted when the verdict is grossly inadequate or excessive "so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence"); *Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (For a trial court to order a new trial based on erroneous admission of testimony, "the record must show not only error but also prejudice."). However, the jury's determination of damages is entitled to substantial deference, and therefore, a jury's verdict should be upheld when it is possible to do so in order to effectuate the jury's express intentions. *Vinson v. Hartley*, 324 S.C. at 404, 477 S.E.2d at 723.

ARGUMENT¹⁶

I. BFS's Second JNOV Motion is Procedurally Precluded Because BFS Never Renewed Its Directed Verdict Motions at the Close of All Evidence

BFS waived its right to bring its Second JNOV Motion by not renewing its directed verdict motions at the close of all evidence. *See* Rule 50(b), SCRCP ("Whenever a motion for a directed verdict made at the close of all the evidence is denied. . . . [a party] may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict") (emphasis added); *RFT Mgmt. Co., LLC v. Tinsley & Adams, L.L.P.*,

¹⁶In further support of Plaintiffs' Opposition to BFS's Second JNOV and New Trial Motions, Plaintiffs incorporate all grounds cited in their various motions, responses, and memoranda previously filed in this action as well as all grounds referenced in their motion in opposition to summary judgment filed prior to trial or otherwise made during motion hearings or during the trial of this matter.

399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) *quoting Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (“When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.”) (emphasis added); *see also Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37 446 S.E.2d 440, 442 (Ct. App. 1994) *aff’d in result*, 320 S.C. 218, 464 S.E.2d 112 (1995) (noting when a defendant moves for a directed verdict at the close of the plaintiff’s case, he must renew that motion at the close of all evidence); *State v. Bailey*, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006) (“If a defendant presents evidence after the denial of his motion for a directed verdict at the close of the [plaintiff’s] case, he must make another motion for a directed verdict at the close of all evidence in order to appeal the sufficiency of the evidence.”). Confronted with the same situation in *Wright versus Craft*, our Court of Appeals explained as follows:

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

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

- II. Here, like in *Wright*, BFS moved for directed verdict at the close of Plaintiffs' case, but did not renew its motion at the close of all the evidence. (Tr. Transcr. 59:10-11). In fact, this Court asked BFS if it had any motions at the close of the evidence, and BFS responded with an unequivocal “No.” *Id.* BFS's failure to renew its directed verdict motions procedurally bars BFS from now seeking JNOV. **BFS's Second JNOV Motion is Procedurally Precluded Because It Is A Successive Motion**

BFS's Second JNOV Motion is also precluded because it is a successive, misplaced attempt to preserve unpreserved issues for appeal. BFS already moved for JNOV and this Court already denied BFS's First JNOV Motion. (Tr. Transcr. 129:6-12). BFS did not file a Rule 59(e) Motion asking the Court to reconsider any aspect of its denial.¹⁷ Following the Court's denial of BFS's First JNOV Motion, the only motion BFS could have filed was a Rule 59(e) Motion. *See Elam v. SCDOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (finding a Rule 59(e) Motion is the proper motion to follow a party's oral JNOV trial motion). BFS's Second JNOV Motion is not such a motion and BFS did not otherwise timely move to reconsider the Court's Form 4 Order entering judgment. Rather, without requesting leave of Court, BFS filed a Second JNOV Motion requesting this Court again rule on issues already ruled upon and rule on issues never raised. This is the definition of a successive motion and South Carolina Courts are clear such motions are improper.

In *Quality Trailer*, for example, our Supreme Court confronted a similar situation involving successive JNOV Motions. *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002). *Quality Trailer* involved a dispute among trucking companies wherein, following trial, the jury found against defendant trucking company ("I-Corp") on plaintiff trucking company's ("Quality Trailer") promissory estoppel and successor liability claims.¹⁸ *Id.* at 218, 562 S.E.2d 615. Following the jury's verdict, I-Corp made a timely, post-trial motion for JNOV and a new trial ("First Motion") which the Court denied. *Id.* Subsequently, I-Corp filed a Second Motion substantively identical to its First Motion, only altering "form" to make the Second

¹⁷ BFS failed to file a Rule 59(e) Motion within ten days after the Court's denial of BFS's First JNOV Motion (September 1, 2016) or within ten days after written notice of the Court's Form 4 Order of Judgment (September 27, 2016). *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the Order.").

¹⁸ During trial, I-Corp moved for directed verdicts against each of Quality Trailer's three claims (violation of bulk transfers act, promissory estoppel and successor liability), one of which was granted (bulk transfers act) and two of which were not (promissory estoppel and successor liability).

Motion appear as if it were a Rule 59(e) Motion.¹⁹ *Id.* at 218, 562 S.E.2d 615-16. The trial court, recognizing the duplicity between the two motions, denied the Second Motion. *Id.* On appeal, our Supreme Court affirmed the trial court, finding:

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

Id. at 220-21, 562 S.E.2d 617-18 (emphasis added); *see also Elam*, 361 S.C. at 21, 602 S.E.2d at 778 ("affirming principles set forth in *Coward Hund*, *Quality Trailer*, and *Collins Music*" and noting "[w]e view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's 'single bite at the apple' in presenting his case.") (emphasis added); *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (finding written post-trial motion, which followed post-trial motion made at the end of the trial, was an improper successive motion); *Coward Hund Construction Company v. Ball Corporation*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (finding post-trial motion successive because it "did not challenge a new ruling") (emphasis added).²⁰

¹⁹ I-Corp captioned its Second Motion as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for [JNOV] and Motion for New Trial". The caption of the Second Motion indicated it was made pursuant to Rules 52, 59 and 60, SCRCP, and the relief requested was tailored to match; however, in all other aspects, I-Corp's Second Motion duplicated its First Motion. Unlike I-Corp, BFS's Motion is not re-captioned to appear as a Rule 59(e) Motion, and further, does not mention the words "reconsider," "alter" or "amend" anywhere in its ten-plus pages.

²⁰ To the extent BFS relies on the case of *Fields versus Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005) to somehow argue its Second JNOV Motion is not successive, Plaintiffs note the circumstances at issue in *Fields* are distinguishable from those here because: (1) BFS did not renew its directed verdict motions whereas *Fields* did; (2) BFS did not request ten days to file a written JNOV Motion whereas *Fields* did; and (3) BFS did not support

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

Here, however, there is no order altering or amending judgment. There is only this Court’s denial of BFS’s First JNOV Motion and this Court’s Order entering an unaltered judgment. (Tr. Transcr. 129:6-12); (Exhibit D). At this point, all JNOV issues are resolved – and they will forever remain resolved because BFS’s Second JNOV Motion is a successive JNOV motion. *See, e.g., Collins*, 353 S.C. at 565, 579 S.E.2d at 526-27 (“Here, IGT requested JNOV. . . in its first post-trial motions. . . The circuit court denied these motions. The court made no alterations or amendments to the judgment. At that point, all issues regarding JNOV. . . were resolved by the circuit judge. . .”).

III. BFS’s Second JNOV Motion is Procedurally Precluded Because BFS Failed to Timely Request Leave to File The Motion

BFS’s Second JNOV Motion is further precluded by BFS’s failure to request leave to file this or any other post-trial motion following the dismissal of the jury. *See* Rule 50(e), SCRCP (“The [JNOV Motion] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter”) (emphasis added); Rule 59(b), SCRCP (“The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court

its First JNOV Motion with any specific ground whereas Fields did. Notably, the *Fields* Court also did not find the entirety of the Second JNOV Motion at issue there proper; rather, the *Fields* Court found only certain grounds, relating to the Court’s evidentiary rulings, were properly raised because only these grounds were stated in support of the original JNOV Motion. Where, like here, no specific grounds are raised in support of an initial JNOV Motion, it follows that all grounds newly raised in a subsequent JNOV motion are improper.

not later than 10 days thereafter.”) (emphasis added); *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (noting “a request to file post-trial motions must be made promptly after the jury is dismissed”) (emphasis added). The Official Notes accompanying the 1986 Amendment to Rule 59 further clarify this point: “In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them.” (emphasis added).

Here, BFS made one post-trial motion (JNOV) “promptly after the end of trial” and did not “move” for additional time to file any other post-trial motions. (Tr. Transcr. 129:2-12). Because BFS did not request leave to file any post-trial motions; its Second JNOV Motion is improper under the rule BFS relies upon to bring the Motion in the first place. *See* Rule 50(e), SCRPC. This rule required BFS request leave to file and BFS did not request leave to file. As such, BFS’s Motion violates the rule and is not properly before this Court.

IV. BFS’s JNOV Motion Improperly Relies on Grounds Not Raised by BFS

Although the foregoing is dispositive, BFS’s JNOV Motion is procedurally flawed for another reason – it relies on a host of grounds not asserted by BFS in its Motions for Directed Verdict. In South Carolina, it is well established that “only the [specific] grounds raised in [a] directed verdict motion may properly be reasserted in a JNOV motion.” *RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 170-71; *Roland v. Palmetto Hills*, 308 S.C. 283, 286-87, n. 2, 417 S.E.2d 626, 628, n. 2 (Ct. App. 1992) (stating “[a] motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict” motion); *see also* Rule 50(a), SCRPC (“A motion for a directed verdict shall state the specific grounds therefor.”); *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (finding JNOV

claim unpreserved because counsel “made only a general directed verdict motion” without stating “specific grounds” supporting the motion).

Here, BFS’s non-renewed directed verdict motions include only one “ground” as to both Plaintiffs’ breach of warranty and strict liability claims.²¹ As to strict liability, BFS claimed “a failure of proof. . .that the windows were, in fact, unreasonably dangerous.” (Tr. Transcr. 38:15-25). As to breach of warranty, BFS claimed “insufficient evidence and proof to establish that the windows are, in fact, in a defective condition.” (Tr. Transcr. 39:10-15). Since these grounds are the only grounds raised by BFS in support of its directed verdict motions, these grounds are the only grounds BFS could assert in support of any JNOV Motion. (See BFS Grounds 5 and 6). Consequently, all other grounds asserted by BFS in its JNOV Motion are improper – period. *Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37 446 S.E.2d 440, 442 (Ct. App. 1994) (finding a JNOV Motion, standing alone and without having raised the same grounds in a prior directed verdict motion at the close of the evidence, is insufficient to preserve the issue for appeal) *aff’d in result*, 320 S.C. 218, 464 S.E.2d 112 (1995). These “other grounds” include:

- BFS’s Grounds 1, 2 and 3 concerning the statute of limitations and equitable estoppel;²²
- BFS’s Ground 4 concerning allegedly inadequate expert testimony or other record evidence;²³

²¹ Plaintiffs note BFS also moved for directed verdict on Plaintiffs’ negligence claim; however, since the jury did not find BFS liable in negligence, this is a moot issue.

²² Regarding equitable estoppel, this Court did not submit the “issue of equitable estoppel” to the jury as BFS maintains. Rather, the Court let the jury decide the question of fact concerning the timing of when Plaintiffs “discovered” their claims after the Court denied BFS’s summary judgment motion on “the statute of limitation issue.” A ruling BFS, again, failed to challenge. Additionally, BFS was not precluded from asserting the statute of limitations as an affirmative defense (which if equitably estopped BFS could not do) and BFS argued the statute of limitations throughout the entirety of trial. Finally, BFS cannot complain about the jury deciding the statute of limitation issue as charged by the Court when BFS did not object to this charge.

²³ Plaintiffs note BFS stipulated to the qualification of Plaintiffs’ experts and the entry of “other record” evidence, including Plaintiffs’ expert reports. Further, Plaintiffs did establish BFS breached its own “standard of care” by failing to honor its contractual obligations.

- BFS's Ground 7 concerning the feasible alternative design requirement;²⁴
- BFS's Grounds 8, 10, 19, 20, 22, 23, and 24 concerning the jury's award;²⁵
- BFS's Ground 9 concerning notice of breach of warranty;²⁶
- BFS's Ground 11 concerning a purported lack of standing;²⁷
- BFS's Grounds 12, 13, 14 and 21 concerning the existence of evidence supporting Plaintiffs' claims;²⁸
- BFS's Grounds 15, 16, 17 and 18 concerning the existence of evidence supporting "any verdict";²⁹
- BFS Ground 25 concerning expert testing;³⁰

²⁴The jury found BFS liable on warranty and strict liability. As such, a feasible alternative design is not required. Even if required, BFS's newly named window expert, Drake, as well as Plaintiffs' expert, Dr. Whitlock, discussed other feasibly designed window products.

²⁵Plaintiffs note these "JNOV" grounds speak directly to "the jury's verdict". BFS did not know "the jury's verdict" prior to the jury rendering its verdict, and thus, it's impossible for BFS to somehow have raised these grounds in any directed verdict motion.

²⁶ Plaintiffs note there is no notice requirement for breach of implied warranties and BFS did not object to the jury charge indicating this is exactly the case. Further, BFS placed the "notice" issue squarely before the jury by describing this lawsuit as the first "notice" BFS received concerning OBH's "window problems". (Tr. Transcr. 27:8-25).

²⁷ BFS claims Plaintiffs "had no standing to claim damages as to [the] windows" because the "windows are not common elements" and "no class was certified." Although this ground was never raised at trial, Plaintiffs acknowledge "standing" is a unique issue which typically may be raised at any time. However, South Carolina courts have also recently held a party may not attempt to raise standing when the issue was not properly before, and ruled upon by, the trial court. *See James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) ("However, when a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review when the trial court was not given the first opportunity to rule on the issue."). Even assuming BFS can procedurally raise "standing", the result remains the same because, substantively, these windows are "common elements" of the Association and all OBH homeowners assigned their individual window claims to the Association. (Assignments and Board Resolution, Jt. Exs. 699, 700) (complete collection of 59 OBH homeowner assignments and OBH Board Resolution accepting assignments); (Master Deed, Jt. Ex. 69) (defining "area of common responsibility" as an area which, by agreement or otherwise, the homeowners agree to allow the Association to manage).

²⁸ These grounds are generally duplicative of those already argued by BFS in its pre-trial motions, and thus, already ruled upon by this Court. *See* Argument II, *supra*.

²⁹ Plaintiffs refer the Court to the Pertinent Background Section above which outlines ample evidence supporting the jury's verdict, including Moore's trial testimony and repair estimate. (Jt. Ex. 304.3); *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989) ("A competent estimate of the cost of repair to a building creates a factual issue regarding damages.").

³⁰ BFS's "testing" ground is bogus. During trial, this Court correctly recognized that it is the jury's job to weigh the evidence (including expert testimony and record evidence relating to testing) and warned BFS that it could not pit its expert against Dr. Whitlock. BFS's "testing" ground ignores all of this and, again, erroneously argues it is somehow entitled judgment as a matter of law based upon unsupported assertions regarding the properness of Dr. Whitlock's

- BFS Ground 26 concerning purportedly damaged windows; and³¹
- BFS Ground 27 concerning setoff.³²

V. Even Assuming Certain Grounds in BFS's Second JNOV Motion are Somehow Properly Before this Court Despite the Motion's Obvious Procedural Flaws, these Grounds Are Without Substantive Merit

All "grounds" considered, this Court must deny BFS's Second JNOV Motion because the record supports the jury's verdict. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict.") citing *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (emphasis added); see also *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994) (a trial court can only be reversed when there is no evidence to support its ruling) (emphasis added).

In fact, there is ample evidence supporting the jury's verdict as well as Plaintiffs' claims leading to the verdict – and BFS agrees. During its argument against Plaintiffs' directed verdict motions made at the close of evidence, BFS maintained:

. . . [T]here has been sufficient evidence the windows are defective by manufacturing purposes as opposed to having some kind of damage that the windows arrived on site until the time that they currently exist. We feel that there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination. There is also a question as far as damages go and the damages would be applicable to all three of those causes of action. There is a question on [if] the windows have caused damage then how much damage have the windows caused. . . So we believe there is a question of fact and plenty of evidence that could be weighed either way as to damages. . . .

window testing. The incredulity of BFS's testing-related attacks is compounded by the undisputed fact that its expert, its client, and its counsel never observed a single window test performed by Dr. Whitlock. Additionally, BFS did not challenge Dr. Whitlock's qualification as an expert in the field of windows and window testing. If BFS had concerns regarding the standards, testing, or methods employed by Dr. Whitlock, the time and place for challenging those issues was during the expert qualification stage.

³¹ Plaintiffs note the evidence showed the window products delivered and installed at OBH were in substantially the same condition as when they left BFS. Contrary to BFS's misplaced contention, there is no evidence supposedly demonstrating the window products were somehow materially altered by the general contractor, the Association or any OBH homeowner.

³² Plaintiffs separately address setoff in their Memorandum Opposing BFS's Motion to Compel.

(Tr. Transcr. 49:18-51:1) (emphasis added).

Thus, even if BFS JNOV's Motion and all its grounds are properly before this Court, it still must be denied because there is "sufficient evidence" sustaining both the jury's verdict and BFS's liability for the verdict. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 S.E.2d 272, 274 (2003) (For purposes of JNOV, the court is only concerned with the existence of any evidence supporting the jury's findings and does not have the authority to resolve conflicts purportedly created by the jury's disregard of other evidence).³³

VI. BFS's Motion for New Trial Absolute, or, in the Alternative New Trial Nisi Remittitur is Untimely

Like BFS's JNOV Motion, BFS's Motion for New Trial Absolute, or, in the alternative New Trial *Nisi Remittitur* ("New Trial Motion") is procedurally precluded because BFS did not follow the rules. As previously mentioned, Rule 59(b), SCRCP, requires that a party move for a new trial promptly after the jury is discharged or request ten days to make the motions. *See* Rule 59(b), SCRCP; *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (holding a trial court has no discretion to hear a motion for new trial where no request for ten days to file the motion was made); *Person v. Carolina Pines Reg'l Med. Ctr.*, 2010 WL 10085618 (S.C. Ct. App. Nov. 4, 2010) (finding a new trial motion untimely when the request for ten days to file the motion was made the day following the jury's verdict).

Here, BFS neither moved for a new trial after the jury was dismissed nor requested ten days to file such a motion. (Trial Transcript 129:6-12). Instead, BFS served its New Trial Motion

³³ Further, as to BFS Grounds 5 and 6, there is evidence establishing (1) the fact that these windows contained a "manufacturing defect"; (2) the damages proximately caused by the windows' "defective" condition. (*See also* Whitlock, VanDommellen, Terradista and Galvin Trial Testimony; Jt. Exs. 129, 130, 300, 301, 302, 304.3, 305).

on the Monday following the tenth day after the jury's verdict³⁴ and did not file the Motion until two later. BFS's failure to request ten days to file this Motion renders the Motion untimely under Rule 59(b). *See Boone, supra*.

VII. This Court Should Deny BFS's New Trial Motion Because it is Meritless

While BFS's New Trial Motion asserts a number of grounds in an attempt to circumvent its liability, these grounds ignore South Carolina law which clearly indicates (a) new trial motions cannot rely on purported "trial errors" not raised at trial; and, (b) courts must deny new trial motions when the jury's verdict is justified by evidence. *See, e.g., Southern Ry. Co. v. Coltex, Inc.*, 285 S. C. 213, 329 S. E. 2d 736 (1985) (denying new trial motion due to failure to object to omission of jury instruction); *State v. Robinson*, 238 S. C. 140, 119 S. E. 2d 671 (1961) (denying new trial motion due to failure to object to testimony or request that it be stricken or disregarded by the jury); *Brown v. Singletary*, 226 S. C. 482, 85 S. E. 2d 738 (1955) (denying new trial motion due to failure to object to remarks by the trial judge); *Lloyd v. Monpoe*, 11 S. C. L. (2 Nott & McC.) 446 (1820) (denying new trial motion due to failure to object to evidence during trial); *see also Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (noting a Court may grant new trial motions only when there is prejudicial error in the admission of evidence or if the verdict is excessive or inadequate).

Here, the thirty-plus grounds stated in BFS's New Trial Motion boil down to five categories: (1) jury charge grounds; (2) evidentiary grounds; (3) testimony grounds; (4) conduct grounds; and (5) verdict grounds. But, as demonstrated below, BFS did not object to any jury charges; BFS did not object to any evidence in the record; BFS did not object to any expert

³⁴ Plaintiffs note the timing of BFS's New Trial Motion is questionable. Despite the internal postage meter date of Monday, September 12, 2016, Plaintiffs did not received the Motion until Friday September 16, 2016, several days after one would expect a letter mailed from Columbia to arrive in Charleston. In fact, the Motion was received on the same day that the September 13, 2016 transmittal to chambers was received.

testimony; BFS did not object to Plaintiffs' counsels or this Court's conduct; and, BFS did not object to the verdict form. Moreover, the jury's verdict is not grossly excessive,³⁵ and the jury's determination of damages is entitled to substantial deference. Accordingly, BFS's New Trial Motion is wholly without merit and warrants denial.

VIII. BFS Cannot Challenge Jury Charges it Failed to Challenge at Trial, and Even if it Could, this Court's Charges Corrected Stated the Law

BFS's New Trial Grounds 2, 3, 4, 5, 6, 15, 16, 20, 21, 24, and 26 all challenge the sufficiency of the Court's jury charges; however, BFS failed to object to any of these charges, and thus, cannot complain as the properness of these charges now.³⁶ Rule 51, SCRPC ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 494 (1999) (noting a party is required to object to jury charges either during the charging of the jury or at the pre-charge conference); *Hope Petty Motors v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992) ("The failure to object to a jury instruction makes the charge the law of the case.").

Even if BFS could challenge these jury charges, the result is the same given the charges were neither erroneous nor prejudicial. *State v. Perry*, 410 S.C. 191, 200, 763 S.E.2d 603, 6067 (2014) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

³⁵ In fact, the jury awarded millions of dollars less than the amount the Plaintiffs requested at trial.

³⁶ Here, BFS never objected to any charge at any time, and further, failed to make any allegedly objectionable or omitted charges as exhibits for preservation. As such, BFS has zero grounds upon which to base an argument that any jury charge or legal instruction was improper (BFS New Trial Grounds 2-6, 15, 16, 20, 26) or that the jury's verdict was contrary to or inconsistent with the law. (BFS New Trial Ground 21, 24).

XI. BFS Cannot Challenge Evidence, Testimony or Conduct It Did Not Challenge At Trial

BFS's New Trial Grounds 7, 8, 9, 10, and 20 challenge evidence, testimony or conduct which, again, BFS failed to challenge at trial. For example, BFS Grounds 7 and 10 seek a new trial because the jury considered "repair amounts" and "window testing" jointly stipulated into evidence by both parties.³⁷ (Jt. Exs. 304.3, 325). BFS Ground 8 seeks a new trial because Plaintiffs' counsel referred to the windows as "illegal" when BFS's counsel did not object to this reference, and further, mentioned "illegal" windows in closing argument. (Trial Transcr. 103:2-3) ("If [Dr. Whitlock] is honestly concerned the windows are illegal. . ."). BFS Ground 9 seeks a new trial because this Court "failed to prevent the pitting of witnesses" when this Court did prevent pitting after the issue was raised by Plaintiffs' counsel as to BFS's counsel – not vice versa.³⁸ Finally, BFS Ground 20 challenges the sufficiency of unspecified "evidence" and "testimony" when BFS, itself, maintained "there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination." (Tr. Transcr. 49:18-51:1) (emphasis added). *See Robinson, Brown and Lloyd, supra.*

IX. BFS Cannot Challenge an Unchallenged Verdict Form or Seek to Specify a General Verdict After its Rendered

BFS's New Trial Grounds 11 and 25 challenge the general verdict and the associated verdict form. However, BFS cannot challenge the verdict form because it was provided to both parties prior to its submission to the jury, and BFS offered no edits or objection to its form or contents. (Exhibit B); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form); *see also*

³⁷ *See also* Footnote 29, *supra*.

³⁸ *See also* Footnote 32, *supra*.

Ambruoso v. Lee, 2010 S.C. App. Unpub. LEXIS 148, *10, 2010 WL 10079451 (Ct. App. Feb. 23, 2010) (unpublished) (holding that trial court did not err in finding defendant waived any objection to verdict form when it failed to do so prior to submitting form to jury).³⁹

Even if BFS could challenge the verdict form, it does not imply that judgment is “mandated against BFS”. The form itself is short, beginning with a line that reads “We the jury find for the Plaintiffs on the following causes of action,” the word “OR” emboldened below, and then ending with a line that reads “We the jury find for the Defendant.” Each of these lines appears on the first page of the verdict form and contains no other indicia mandating the jury find for either party. (Exhibit C).

Additionally, BFS cannot request any clarification as to the verdict the jury generally awarded when BFS failed to request an interrogatory inquiring into any aspect of the verdict before the jury was excused. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) (“Appellants waived appellate review [trial court’s failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter.”).

Even if BFS could seek clarification as to “what damages were awarded as to each named party and the amount awarded to each named party” there is no clarification needed because the damages were awarded as to the named Plaintiffs and the OBH POA represents all named Plaintiffs. (Jt. Exs. 699, 700).

X. BFS Cannot Challenge the Jury’s Verdict When the Verdict Falls Within the Damage Range Established by the Evidence

BFS’s remaining New Trial Grounds challenge the jury’s verdict as “grossly excessive,” and influenced by “matters outside the evidence.” Yet, BFS offers no “compelling reasons” as to

³⁹ *Ambruso* attached hereto in Appendix “A”.

why the Court should disturb the jury's verdict and ignores the fact BFS asked the jury to render its verdict based upon "matters in evidence". (Tr. Transcr. 111:5) ("[Y]ou've got all the evidence to consider.") (emphasis added); *see also Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (The thirteenth juror doctrine may be invoked only when "the evidence does not justify the verdict."); *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) ("Compelling reasons, however, must be given to justify invading the jury's province in this manner.").

This evidence, jointly stipulated to by BFS, provided the jury with a "damage range" between \$12,000 and \$5,000,000 – the jury's \$2,163,493 verdict falls well within this range, and thus, is not "excessive". *Wright*, 372 S.C. at 36, 640 S.E.2d at 505 ("When a verdict falls within the range of the evidence, the courts will not disturb it on the ground of excessiveness."); *Collins Music*, 332 S.C. at 148, 503 S.E.2d at 482 (refusing to alter an award because the verdict was within the range of amounts given during testimony at trial); *Hawkins*, 328 S.C. at 601, 493 S.E.2d at 883 (finding damages award was proper because it was within range of evidence presented during trial). As such, this Court should uphold the jury's verdict in order to effectuate the jury's express intentions.

XII. This Court Should Deny BFS's Motion Because Any Error Purportedly Committed is Harmless

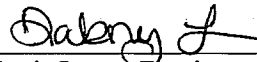
Finally, even assuming this Court did "err" as BFS suggests, such error is harmless because the ultimate outcome remains the same – BFS is liable to Plaintiffs on at least one of Plaintiffs' claims (strict liability, breach of express warranty, or breach of implied warranty); and, BFS's liability as to any one of these claims amounts to \$2,163,493. *State v. Byers*, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of trial"); *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 or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury, the verdict stands).

CONCLUSION

Based upon the foregoing, This Court should deny BFS'S Second JNOV Motion and New Trial Motion.

JUSTIN O'TOOLE LUCEY, P.A.



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Dabny Lynn, Esquire
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Mount Pleasant, SC 29465
jlucey@lucey-law.com
dlynn@lucey-law.com
Attorneys for Plaintiffs

November 16, 2016
Charleston, South Carolina

Exhibit "B"

**9/1/16 DYER EMAIL AGREEING TO
PROPOSED SECOND VERDICT FORM**



Re: OBH - Plaintiffs proposed verdict form

1 message

Davi Dyer <ddyer@kernodelaw.com>

Thu, Sep 1, 2016 at 8:17 PM

To: Justin Lucey <jlucey@lucey-law.com>

Cc: Kristina Shernoff <kshernoff@lucey-law.com>, dgoodsteinj@sccourts.org, DGOODSTEINLC@sccourts.org, Annette Mixson <amixson@lucey-law.com>

Fine with me

C. Davi Dyer
Kernodle Coleman
914 Folly Road, Suite 200
Charleston, SC 29414
ddyer@kernodelaw.com
(843) 795-7800
(843) 795-3032 Fax

On Thu, Sep 1, 2016 at 8:13 PM, Justin Lucey <jlucey@lucey-law.com> wrote:
Judge Goodstein & Davi:

Attached is a proposed second verdict form. Please let me know of any edits. My staff will print several copies.

Justin Lucey

On Thu, Sep 1, 2016 at 2:20 PM, Kristina Shernoff <kshernoff@lucey-law.com> wrote:

Dear Judge Goodstein,

Per Mr. Lucey's instructions, please find the attached verdict form with the case caption.

Thank you,

Kristina

Kristina K. Shernoff

JUSTIN O'TOOLE LUCEY, PA

415 Mill Street

Mt. Pleasant, SC 29464

843-849-8400 (tel.)

843-849-8406 (fax)



<https://mail.google.com/mail/u/0/?ui=2&ik=2e7fd84926&view=pt&q=fine&qs=true&search=query&th=156e8422fab59115&siml=156e8422fab59115>

ROA_04537

Exhibit "E"

NOTICE OF ENTRY OF FORM 4 ORDER

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

178



JUSTIN O'TOOLE LUCEY
PO BOX 806
MT PLEASANT SC 29465-0806

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Jury Verdict for the Plaintiff

CASE NO: 2012CP1007594

One Belle Hall Property Owners Association Inc , plaintiff, et al VS Trammell Crow Residential ,

This judgment was entered on the 22nd day of September, 2016, and notice mailed first class on Tuesday, September 27, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

OCT 3 2016



ROA_04539

APPENDIX A

Ambruoso v. Lee
(Unpublished case)

Ambruoso v. Lee

Court of Appeals of South Carolina

December 9, 2009. Heard; February 23, 2010. Filed

Unpublished Opinion No. 2010-UP-158

Reporter

2010 S.C. App. Unpub. LEXIS 148; 2010 WL 10079451

Victor N. Ambruoso, MD, and Rachael Ambruoso, Appellants, v. Frank L. Lee, Jr., Respondent.

Notice: THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

Subsequent History: Rehearing denied by Ambruoso v. Frank, 2010 S.C. App. Unpub. LEXIS 268 (S.C. Ct. App., Apr. 22, 2010)

Prior History: [*1] Appeal From Spartanburg County. Doyet A. Early, III. Circuit Court Judge.

Disposition: AFFIRMED.

Core Terms

trial court, new trial, damages, verdict form, hip, thirteenth juror, jury's, motion for a new trial, appointments, pain, inadequacy, injuries

Counsel: Donald C. Coggins, Jr., and Amanda H. Craven, of Spartanburg, for Appellants.

Michael James Saratt, of Landrum, and T. David Rheney, of Greenville, for Respondent.

Judges: HUFF, WILLIAMS, and GEATHERS, JJ. concur.

Opinion

PER CURIAM: Dr. Victor N. Ambruoso and Rachel Ambruoso appeal the trial court's denial of their motions for a new trial. They argue the court should have granted new trial absolute due to the inadequacy of the jury's verdict or new trial pursuant to the thirteenth juror doctrine. They also assert they were entitled to a new trial due to an error on the verdict form. We affirm.

FACTS/PROCEDURAL HISTORY

On April 12, 2004, the Ambruosos were involved in an automobile accident with Frank L. Lee, Jr. Dr. Ambruoso was driving a 1997 Chevrolet Blazer in which Mrs. Ambruoso was a passenger. They were stopped to make a left turn when the truck driven by Lee collided into the rear of their vehicle. Their Blazer was totaled as a result of the accident.

Immediately after the accident, Lee left his vehicle and went to the Blazer to apologize for the accident. The Ambruosos exited their vehicle and began talking to Lee. [*2] They admittedly were upset with him. Kenneth Bishop, who had stopped to offer assistance, asked the Ambruosos to return to their vehicle, which they did. Soon thereafter, an ambulance arrived and took them to the hospital where they were treated and released. The Ambruosos were referred to Dr. Gerald Rollins with Orthopedic Associates. Dr. Ambruoso was treated by Dr. Rollins and underwent physical therapy through June 16, 2004. Dr. Ambruoso testified that his problems were largely resolved at that point. Mrs. Ambruoso was treated by Dr. Rollins and underwent physical therapy through August 9, 2004. Although some of her pain resolved a few weeks after the accident, she continued to experience pain in her right hip, which had caused her problems prior to the accident. She eventually had hip replacement surgery at Duke University Medical Center in February of 2005. After a long recovery period, Mrs. Ambruoso's hip pain largely subsided. However, due to her fear of reinjuring herself, she did not return to her previous activities of skiing and horseback riding.

The Ambruosos brought this action against Lee. During the trial, Lee admitted fault. Thus, the trial court submitted the issue [*3] of damages alone to the jury. The jury returned a verdict of \$ 6,210.00 in actual damages for Dr. Ambruoso and \$ 4,472.00 in actual damages for Mrs. Ambruoso. The Ambruosos requested ten days to file their post-trial motion. In their written motion, they sought a new trial nisi additur and new trial absolute based on the inadequacy of the verdict and new trial pursuant to the thirteenth juror doctrine. They also argued they were entitled to a new trial due to the inclusion of State Farm Insurance Company as a defendant in the caption of the verdict form. The trial court denied the motion. This appeal followed.

LAW/ANALYSIS

1. New trial absolute

The Ambruosos argue the trial court erred in denying their motion for a new trial absolute due to the inadequacy of the verdict. We disagree.

"The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion." *Dillon v. Frazer*, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009). The court must look at the testimony and inferences raised in the light most favorable to the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000). [*4] In considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive. *Ekam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered. *Welch*, at 302, 536 S.E.2d at 420. A jury's determination of damages is entitled to substantial deference. *Knoke v. S.C. Dep't. of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

The Ambruosos contend the injuries for which they claimed damages were consistent with the impact of the collision. They assert no evidence was submitted that questioned the existence of these injuries or the initial treatment they received, which included the ambulance service, emergency room treatment, follow-up treatment with Dr. Rollins, and the physical therapy ordered through his office. They claim the total costs for these treatments were \$ 3,400.00 for Dr. Ambruoso and \$ 6,067.00 for Mrs. Ambruoso. The jury, [*5] however, returned a verdict of \$ 6,210.00 in actual damages for Dr. Ambruoso and \$ 4,472.00 in actual damages for Mrs. Ambruoso.

"Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide." *Ross v. Paddy*, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). "The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest in the result." *Id.*

In the present case, Lee contested Mrs. Ambruoso's claim for damages relating to her hip problems and eventual hip replacement surgery. Lee solicited testimony Mrs. Ambruoso

had complained of and sought treatment for hip pain prior to the accident. An x-ray taken on April 29, 2003 showed advanced arthritis of the right hip. She then sought treatment from Dr. Lang with Duke University Medical Center. During an examination by Dr. Lang on April 1, 2004, Mrs. Ambruoso showed a decreased range of motion. She reported to her orthopedic surgeon in December [*6] of 2004 that while she had led an active lifestyle, starting two years earlier she had become increasingly inactive and gained weight. In addition, Mrs. Ambruoso took medication for arthritis, pain relief, and depression in the months preceding the accident.

Although the Ambruosos are not disputing on appeal the jury's failure to award damages for Mrs. Ambruoso's treatment at Duke University Medical Center, they do argue they are entitled to recover damages for the treatment from Dr. Rollins, as well as an MRI taken on July 20, 2004, which cost \$ 2,195.00. Dr. Rollins testified that on June 14, 2004, he believed Mrs. Ambruoso's complaints would be resolved in around thirty days of conservative treatment. He did not plan on seeing her back after that point. However, Mrs. Ambruoso had returned to Dr. Rollins on August 9, 2004 with primary complaints of hip and back pain after having an MRI taken on July 20, 2004. The MRI of her right hip showed advanced chondromalacia, arthritis, and in Dr. Rollins' opinion, avascular necrosis, which is death of the bone. The jury may have determined not all of the treatments claimed were in fact related to injuries caused by the accident, but were in [*7] fact due to the pre-existing condition of her hip.

The Ambruosos also contend the verdict for Dr. Ambruoso was inadequate when considering his testimony concerning his loss of income due to the accident. Dr. Ambruoso claimed \$ 2,455.20 in lost income from the appointments he cancelled at his part-time medical practice to attend his own appointments, court, and a meeting with his attorney. This amount, added to the cost of his medical treatment of \$ 3,400.00, totals \$ 5,855.20, which is less than the jury's award of \$ 6,210.00. Thus, the verdict amount is not "shockingly disproportionate to the injuries suffered." In addition, Lee contested the amount Dr. Ambruoso claimed in lost income. He asserted Dr. Ambruoso could have mitigated the loss of cancelled appointments by scheduling his own appointments on the days in which his part-time medical practice was not open. Lee also contended Dr. Ambruoso overestimated the number of appointments that might have been scheduled on the days he closed the practice in advance to attend his own appointments. Accordingly, the jury may have rejected some of Dr. Ambruoso's claims for damages for lost income.

We find the jury's award of damages was within [*8] the evidence presented at trial. Accordingly, we hold the trial court did not abuse its discretion in denying the Ambruosos'

motion for a new trial absolute.

2. Thirteenth Juror Doctrine

The Ambruosos argue the trial court should have granted a new trial under the thirteenth juror doctrine. We disagree.

In South Carolina, a trial judge may grant a new trial following a jury verdict under the thirteenth juror doctrine. The doctrine "entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (quoting *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). "As the 'thirteenth juror', the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Id.*

The appellate court will uphold the trial judge's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. Our review is limited to consideration of [*9] whether evidence exists to support the trial court's decision. *Id.* at 478-79, 567 S.E.2d at 854. "The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." *Bailey v. Peacock*, 318 S.C. 13, 15, 455 S.E.2d 690, 692 (1995).

Lee asserted the Ambruosos were not entitled to any damages as a result of the accident. He was not required to submit evidence directly contradicting their testimony in order for their claims to be considered contested. As stated above, the trial court's decision to allow the jury's verdict to stand was supported by the evidence in the record. Accordingly, we find no error in the trial court's denial of the Ambruosos' motion for a new trial pursuant to the thirteenth juror doctrine.

3. Verdict Form

The Ambruosos argue they are entitled to a new trial because the verdict form impermissibly included evidence of liability insurance. The verdict form listed State Farm Mutual Automotive Insurance as a defendant. Although this form was

provided to the attorneys prior to its submission to the jury, the Ambruosos did not object to it at that time. [*10] After the jury returned its verdict, the court noticed the inclusion of State Farm as a defendant. The Ambruosos did not complain about the inclusion of State Farm in the caption of the verdict form until their post-trial motion. The trial court held the Ambruosos had waived any objection by failing to object earlier. As the trial court noted, all of the parties had an opportunity to review and approve the verdict form before it was submitted to the jury. We find the trial court did not err in holding the Ambruosos waived their objection to the verdict form. See *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form).

In addition, we find the trial court cured any error with an instruction given the jury. During deliberations, the jury sent a note to the court asking: "Does insurance affect [*11] the settlement? If it does, what percentage of the bills will be paid by insurance[?]" The court responded: "It does not affect your verdict. It is not to be considered or discussed." Although the court was not aware of the inclusion of State Farm in the caption of the verdict form at the time, its response to the jury's question adequately addressed the issue. "Generally, a curative instruction is deemed to have cured any alleged error." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." *Id.* at 658, 623 S.E.2d at 130. Accordingly, we find the trial court did not abuse its discretion in denying the Ambruosos' motion for new trial on this issue.

CONCLUSION

For the above stated reasons, the decision of the trial court is

AFFIRMED.

HUFF, WILLIAMS, and GEATHERS, JJ. concur.

End of Document

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 First Source – Southeast Group,)
LLC;)

Defendant.

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

**PLAINTIFFS' MEMORANDUM OF
LAW IN OPPOSITION TO BUILDERS
FIRST SOURCE-SOUTHEAST
GROUP, LLC'S MOTION TO
COMPEL AND MOTION FOR
SETOFF**

FILED
2016 NOV 15 PM 3:34
CLERK

Plaintiffs submit this Memorandum of Law in Opposition to Defendant Builders First Source—Southeast Group, LLC's (hereinafter "BFS") Motion to Compel (hereinafter "Motion"), and respectfully state as follows:

SUMMARY OF ARGUMENT

BFS's "Motion to Compel and Motion for Determination of Setoff" first requests the Court compel the production of certain settlement agreements and indicates "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." (Motion, p. 3) (emphasis added). BFS's "Motion to Compel" places the proverbial cart before the horse. There is no need to compel anything unless (a) BFS properly preserved its ability to seek a setoff determination and (b) BFS meets its burden in proving that it is entitled to setoff as a matter of law under the Act (the only ground for setoff BFS's Motion asserts). If, and only if, this is the case, then is settlement documentation needed. Accordingly, Plaintiffs' opposition

addresses the reasons why (a) BFS is procedurally precluded from seeking setoff and (b) BFS is not otherwise entitled setoff as a matter of law.

This Court should deny BFS's Motion because it is procedurally precluded and substantively flawed. Procedurally speaking, this Court already denied BFS's Motion when it entered judgment against BFS in the amount of \$2,163,493 setting off nothing from the amount generally awarded by the jury. BFS did not move to reconsider this Order and it is too late for BFS to do so now.

Substantively speaking, the Court correctly denied setoff because BFS is not entitled setoff for a number of distinct reasons:

- BFS is not a "joint tortfeasor"; rather, BFS owed independent obligations to Plaintiffs, arising from an independent contract which resulted in independent damages;
- BFS contractually assumed sole responsibility for all damages awarded and waived its ability to setoff these damages;
- BFS admits Plaintiffs' damages are "divisible," and thus, capable of individual allocation;
- BFS effectively tried damage allocation and setoff by consent in asking the jury to allocate fault and damages amongst several parties;
- BFS waived its right to challenge the jury's verdict, thereby waiving its ability to set off the verdict; and
- Even assuming BFS is somehow entitled setoff despite the foregoing, this Court should setoff nothing because reducing the verdict is not necessary to provide justice between the parties.

Because BFS is precluded, both procedurally and substantively, from seeking setoff, the entirety of BFS's Motion is moot and should be summarily overruled.

PERTINENT BACKGROUND¹

A.) Overview

1. This case concerns window products supplied by BFS to the One Belle Hall Condominiums ("OBH") which BFS warranted as "quality" and "free from defect". Contrary to BFS's representations, the windows are neither "quality" nor "free from defect" because they all leak, resulting in substantial damage to OBH.

2. Over the course of August 29, 2016 through September 1, 2016, a jury trial was held regarding these leaky windows and the damages these leaky windows caused.²

3. After weighing the evidence and testimony by multiple witnesses, the jury agreed the hundreds of leaky windows supplied by BFS to OBH were defective, unreasonably dangerous and contrary to what BFS promised, returning a \$2,163,493 general verdict favoring Plaintiffs on their breach of warranty and strict liability causes of action.³

B.) Trial Specifics

4. On August 29th, jury selection occurred and pre-trial motions were presented and argued by both Plaintiffs and BFS.

5. One of these Motions included a BFS Motion in Limine⁴ seeking, in part, the prohibition of any reference to collateral sources including "liability insurance" and "settlement demands, offers or negotiations between the parties." (Ex. A at 3). This Court granted this part of BFS' Motion.

¹ Plaintiffs incorporate, by reference, the Pertinent Background section included in Plaintiffs' Memorandum Opposing BFS's Second JNOV Motion and New Trial Motion filed simultaneously herewith.

² At trial, Plaintiffs proceeded against BFS on three claims – breach of warranty, negligence and strict liability.

³ The jury found that BFS was not liable in negligence.

⁴ BFS Motion in Limine is attached hereto as Exhibit "A".

6. BFS's Motion in Limine, in a separate part, also claimed BFS "cannot be held jointly and severally liable" (should BFS be found liable) because "any damages applicable to BFS are clearly divisible". (Ex. A at 6).⁵

7. On August 30th, Plaintiffs and BFS presented their opening statements. During BFS's opening statement, BFS's counsel first informs the jury:

We're here today because I can't come to an agreement with Mr. Lucey and out [sic] clients thereby can't come to any agreement as well; it's all kind of part and parcel. So we've spent several years trying to work through this process and come to a conclusion that we might be able to live with, and unfortunately, we haven't been able to do so, so that's why you're here.

(Tr. Transcr. 21:10-12) (emphasis added).⁶

9. BFS's counsel then (1) explains to the jury that "many installation issues" and "other problems" plagued the property; (2) describes the "14 million dollar fix" Plaintiffs seek to remedy "all problems"; (3) asks the jury to consider the amount of water intrusion it could attribute to the windows as opposed to "other problems"; and (4) points the finger at a host of absent parties who were allegedly more responsible for these "problems" because "BFS was just the middleman." (Tr. Transcr. 26:10-32:1). In other words, all BFS did, if anything, was process a purchase order regarding windows – it "did not install" the windows, it "did not deliver" the windows, it "did not manufacture" the windows, and thus, it did not contribute to any construction, design or manufacturer-related problems at One Belle Hall. (Tr. Transcr. 32:7-14).

10. By injecting settlement negotiations into the case, BFS also implicated the "other parties" who did all these things BFS did not do (i.e., the "manufacturer," "general

⁵ This part of BFS's Motion of Limine entitled "Apportionment of Damages" is a Motion for Setoff and, by asking this Court to "apportion damage" based upon the facts that: (1) BFS is NOT a joint tortfeasor; and (2) damages attributable to BFS are CLEARLY DIVISIBLE, shows exactly why BFS is NOT entitled setoff.

⁶ The portions of the Trial Transcript referenced herein are collectively attached hereto as Exhibit "B".

contractor,” “architect,” “window installer,” “framing contractor”, and “40 plus defendants” originally named in the suit) “came to an agreement” with, and therefore, paid Plaintiffs for their share of these “problems”. (Tr. Transcr. 21:10-12; 25:24-26:5; 26:10-32:1).

11. On August 30th and August 31st, Plaintiffs called POA President, Len Terradista, and BFS employee, Bob Lanier, both of whom testified as to BFS’s contractual obligations to One Belle Hall. These contractual obligations, encompassed within a purchase order BFS admittedly agreed to (Jt. Ex. 44(a)) and an express warranty BFS admittedly provided (Jt. Ex. 188), state:

[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee for any costs or expenses attributable to errors in [BFS’s] performance.

Jt. Ex. 44(a) (emphasis added).

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.

Jt. Ex. 188 (emphasis added).

12. Also on August 31st, Plaintiffs called Gary Moore (“Moore”) as their damages expert. Moore’s cost estimate was admitted into evidence and published to the jury. The total repair cost at One Belle Hall is \$14,451,023.34. Moore testified that a “windows-only” replacement cost would total \$3,500,000; the cost to remove and replace the cladding around the windows, as well as replace the windows, would be \$4,700,000; and, the cost to repair all consequential damage related to the windows, remove and repair the cladding around the windows, and replace the windows would total approximately \$5,000,000.

13. On September 1st, BFS called J.R. Steve Watkins, Jr. (“Watkins”) as its damages expert. Watkins’ previous cost estimates, prepared for approximately nine different

defendants, plus a recently produced Watkins' "windows-only" estimate were entered into evidence. Watkins' "window-only" estimate totaled \$12,000, and only encompassed the removal and resealing of the windows' sill insert – it did not include the removal and replacement of the windows, surrounding cladding or related consequential damages.⁷

14. Prior to closing arguments, counsel for both parties conversed with the Court regarding several issues including setoff. During this conversation, BFS's counsel was informed of Plaintiffs' position in this Court's presence that: (1) Plaintiffs were not sure BFS would be entitled to any setoff; (2) the issue of whether BFS was entitled to a setoff might be affected by the substance of its closing arguments; and (3) Plaintiffs would have settlement agreements and amounts available for the Court's review if the Court reached that issue.

15. On September 1st, both parties gave closing arguments to the jury. In Plaintiffs' closing argument, counsel highlighted for the jury the elements of Plaintiffs' claims,⁸ reiterated the evidence demonstrating BFS's liability under each of these claims,⁹ and addressed BFS's "middleman" and "multiparty" defenses to liability as follows:

The defenses that we've seen by [BFS] are several. One is the middleman defense. I sometimes call it the see no evil, hear no evil, do no evil defense. Hey, we're just in it for a buck; don't hold us accountable; that's how it is. We don't believe that the law you will hear from the Judge will include within it a middleman defense the hey we just sold the product defense. . .

The multiple party defense. What we've heard about that is somehow this is caused by the architect, caused by someone else; not us. . . The law does not insulate the middleman. They are responsible we'll believe you'll see under the law as the Judge gives it to you. They are responsible for the products they sell. .

⁷ Notably, the exhibits stipulated to by both parties included expert reports describing all the defective construction issues affecting One Belle Hall and repair estimates pricing all of these issues, both from the Plaintiffs' and Defendants' perspectives. (*See, e.g.*, Jt. Exs. 300, 301, 302, 304.3, 305, 325). Plaintiffs and BFS then presented evidence as to their above-referenced "window repair estimates" as related to BFS, clearly dividing and separating damages attributable to BFS. (*See, e.g.*, Moore and Watkins Trial Testimony; Jt. Ex. 325(h)).

⁸ (Trial Transcr. 87:24-89:3).

⁹ (Trial Transcr. 68:16-87:33).

.They sold them. You put into commerce the defective product you can be held accountable for it.

(Tr. Transcr. 89:4-91:5) (emphasis added).

16. As to damages associated with BFS's liability, Plaintiffs' counsel explained proximate causation, mentioned a reduction in cost for a potential over-lap with repair costs for the defective windows and repair of the stucco, and asked the jury to return a verdict for \$4,700,000.00:

[W]hen you consider the damages caused by a defective product you must decide whether or not the product proximately caused the damage. . .[W]e would like you to listen to when she instructs you on th[e] instruction that I'll call concurrent cause. In other words. . .you can have two or more proximate causes. And any participant who participates in proximately causing that damage in the eyes of the law can be held liable for that resulting damage. So the key question is are the windows a proximate cause not the proximate cause. So in summation on the issue of the defect we believe we've answered the questions posed by [BFS] during its opening. Did they make a promise they did not keep? Yes. Did it supply a dangerous product? Yes. Do the windows leak? Yes. Do those leaky windows result in damage? Yes. And what is that damage?

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).¹⁰

17. In BFS's closing argument, BFS's counsel again described BFS as only "the middleman" who, similar to "a pharmacist" merely filing "a prescription," merely filled a purchase order:

[W]ould you expect in the [prescription filling] situation for the pharmacist, the middleman here, to go back to the doctor and question whether or not the doctor, the professional has adequately diagnosed you or if he selected the right medication for your condition? And at the same time would you expect for the pharmacist to look to Pfizer, the drug company and say wait a minute I need copies of all FDA approvals that you go to be able to bring that product to the market before I can give it to my customer.

[BFS] is in a similar position. There is a design professional in one end of this who says this building that I designed. These are the windows. . .that I want to put in this building. . .And the contractor carries that order to [BFS] and says here's what our design professional wants. [BFS] goes to the window manufacturer and places the order trusting that the window manufacturer who is selling a window on the open market has done everything that they need to do in order to sell it on the market; that is has passed the certification. Would you expect [BFS] to do anything more than place the order trusting that the professionals. . .[have] done everything they need to do to qualify this situation.

(Tr. Transcr. 103:22-105:22) (emphasis added); *see also* (Tr. Transcr. 100:19-102:8) (BFS pointing the finger at "TCR", "the architect", "the manufacturer", "the building code officials and "the homeowners").

18. BFS's then proclaimed "at the end of the day it is all about money in this lawsuit,"¹¹ proceeds to reference the "40 plus" defendants that were no longer in the case, and

¹⁰ In response to BFS's repeated interjections of "all-encompassing damages" and Moore's "14 million dollar fix" for these damages, Plaintiffs' counsel further explained:

Now BFS wanted to make a little hay with some of Mr. Moore's numbers on the front page [of his 14 million estimate]. When you look at that estimate in the jury room you'll see that every line on that front page has a detailed supporting page attached to it. . .And you'll see the sections, the top sections on his repair estimate that were removed because they did not relate to water damage or added in because it did relate to window damage. . .And he allocated the general conditions at the bottom. He reduced the amount of time the job would take and he detailed it. . .

(Tr. Transcr. 94:13-95:7) (emphasis added).

places "blame" for all damages on these other defendants and "comprehensive problems outside window units":

We saw lots and lots of pictures and we heard lots of testimony that there are very many comprehensive problems with the buildings outside of the window units. We know that the buildings have been damaged by the roof, the stucco, the siding, the bricks, the waterproofing, the installation of flashings and missing flashings, the waterproofing on balconies and stairs; the list goes on and on from the top to the bottom. We've told you that this whole week. . . Over 40 people as you heard were originally brought in as defendants and blamed for the situation that is going on here.

(Tr. Transcr. 113:5-15) (emphasis added).

19. On rebuttal, Plaintiffs' counsel responded to BFS's repeated finger-pointing and multiparty theme:

We all know what is going on here. The manufacturer was peddling cheap windows to make a buck. TCR was using cheap windows to make a buck. [BFS] was reselling cheap windows to make a buck. But [OBH] homeowners are they victim and [BFS doesn't] get a get out of jail free card. They are part of that transaction. They facilitated TCR using these cheap windows. They supplied them, they sold them. Hold them responsible.

(Tr. Transcr. 123:10-18) (emphasis added).

20. Prior to handing the case to the jury, the Court asked each party to review its proposed jury charges as well as the verdict form. (Tr. Transcr. 60:5-22). BFS counsel made no objections to the jury charges and consented to the format of the final verdict form.¹²

21. During the evening of September 1st, the jury returned a general verdict in favor of Plaintiffs in the amount of \$2,163,493¹³ on Plaintiffs' breach of warranty and strict liability causes of action.

C.) Post-Trial Matters

¹¹ (Tr. Transcr. 112:14-15) (emphasis added).

¹² In fact, BFS's counsel sent an e-mail to the Court indicating that the final verdict form "is fine." A copy of this e-mail is attached hereto as Exhibit "C".

¹³ Notably, the jury's verdict is approximately 1.4 million dollars less than Moore's 3.5 million dollar estimate for removing and replacing the windows alone. The verdict form is attached hereto as Exhibit "D".

22. Following the jury's verdict, BFS made a Motion for Judgment Notwithstanding the Verdict ("JNOV Motion") which was subsequently denied. BFS presented no other post-trial motions at the conclusion of trial.

23. On September 7, 2016, BFS filed its Motion to Compel.¹⁴

24. On September 12, 2016, following the denial of its first JNOV Motion, and without seeking leave of Court, BFS filed a second JNOV Motion as well as a Motion for a New Trial. (*See* Second JNOV Motion and Motion for New Trial).

25. On September 20, 2016, this Court requested counsel provide available dates for a hearing regarding the case, and subsequently, a hearing was scheduled for October 14, 2016.

26. On September 22, 2016, this Court issued a Form 4 Order¹⁵ 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 Order was filed September 1, 2016 *nunc pro tunc*.

27. On September 27, 2016, the Court mailed a notice informing all parties of the entry of its Form 4 Order.¹⁶

28. To date, BFS has yet to file a Motion to Alter or Amend the Form 4 Order or any other ruling issued by the Court before or during trial.¹⁷

29. On October 12, 2016, BFS's counsel requested the rescheduling of the October 14th hearing due to a personal conflict. Thereafter, the hearing was rescheduled to occur on November 18th.

¹⁴ Based upon the Motion's cover letter, attached hereto as Exhibit "E", it does not appear BFS sent a copy of the Motion to Judge Goodstein's chambers.

¹⁵ The Court's Form 4 Order is attached hereto as Exhibit "F".

¹⁶ The Court's mailed notice is attached hereto as Exhibit "G".

¹⁷ In response to Hurricane Matthew, the South Carolina Supreme Court issued an Order indicating pleading due dates falling between October 5, 2016 through October 15, 2016 were extended to the next business day, Monday, October 18th. However, BFS did not file a Motion to Alter or Amend the Court's Form 4 Order at this time or anytime thereafter.

STANDARD

A.) Setoff Timing

Setoff, if applicable, occurs prior to the Court's entry of judgment on a jury verdict. *Smith v. Widener*, 397 S.C. 468, 471-472, 724 S.E.2d 188, 190 (Ct. App. 2012) (noting "before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . .")(emphasis added). The Court's entry of judgment, whether by way of a Form 4 Order or otherwise, represents the Court's final determination of the case and effectively ends its jurisdiction over the matter. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 604-605, 567 S.E.2d 514, 518 (Ct. App. 2002) (acknowledging the finality of a Form 4 Order and indicating "absolutely nothing remains to be done by [the Court] after the signing of the order."). In order to extend the jurisdiction of the Court, and preserve any right to challenge any aspect of the Court's final order, a party must file a motion to alter or amend pursuant to Rule 59(e), SCRPC. Rule 59(e), SCRPC; *see also Zivitz v. Greenberg*, 279 F.3d 536, 539 (7th Cir. 2002) (A motion under Rule 59(e) to alter or amend the judgment is an appropriate vehicle to request a setoff of a jury verdict).

When no Rule 59(e) motion is made within the ten-day timeframe proscribed by the Rule, the party cannot subsequently challenge the Order because the Order is now the law of the case, whether right or wrong. *See, e.g., S.C. Coastal Conservation League v. S.C. Dept. of Health and Environmental Control*, 610 S.E.2d 482 (S.C. 2005), *reh'g denied*, (Apr. 7, 2005) (noting a ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling).

B.) Setoff Generally

A non-settling defendant is only entitled to a credit in the amount of a settlement paid by a joint tortfeasor when necessary to prevent the plaintiff from obtaining a double recovery. This concept, known as "setoff", is equitable in nature and has existed at common law in South Carolina for many years. *See, e.g., Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911) (stating "[t]he jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties" and noting the court's ability to order setoff "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"). In 1988, these equitable principles were codified in the South Carolina Contribution Among Tortfeasors Act ("the Act") which, in pertinent part, provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code § 15-38-50.

Since the enactment of the Act, South Carolina courts have struggled with the standard applicable to setoff, especially given its equitable underpinnings. Some opinions hold setoff arises automatically by operation of law whenever there is a settlement by a joint tortfeasor for the same injury, but not when the settlement involves compensation for a different injury from the one tried to verdict. *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) ("A settlement by a joint tortfeasor reduces the claim against the other to the extent

of any amount stipulated by the release or covenant. . .so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the non-settling defendant's right to setoff arises by operation of law.” (citations omitted) (emphasis added); *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (“Section 15-38-50 grants the court no discretion in determining the equities involved in applying setoff once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors”) (citations omitted) (emphasis added); *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999) (holding 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); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998) (holding when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law).

Other opinions hold setoff is not an automatic right, but rather, an equitable remedy which a court may grant or deny at its discretion. *Riley v. Ford Motor Co.*, 408 S.C. 1, 17 n.6., 757 S.E.2d 422, 431 n.6 (Ct. App. 2014) (“[S]etoff is an equitable remedy a court is not required to grant”) citing *Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (noting setoff is equitable in nature), *aff’d in part and rev’d in part*, *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015); *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 setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A setoff is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court. Therefore, a motion

for setoff is addressed to the discretion of the court, and this discretion should not be arbitrarily or capriciously exercised.”) citing *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 426 (Ct. App. 2000); *Rookard*, 89 S.C. at 376, 71 S.E. at 995.

Regardless of the standard applicable here,¹⁸ the result remains the same because BFS is not entitled setoff as either a matter of law or equity. Here’s why:

First, setoff only “arises automatically by operation of law” when (1) a non-settling defendant qualifies as a “joint tortfeasor”;¹⁹ and (2) a settling defendant compensated the “same plaintiff on a claim for the same injury” for which the jury awarded damages to the non-settling defendant. Here, BFS is not a “joint tortfeasor”; settlements by other defendants were neither for the same injury nor the same cause of action;²⁰ and, BFS effectively tried setoff to the jury. Accordingly, BFS is not entitled setoff as a matter of law.

Additionally, setoff only arises in equity “when necessary to provide justice between the parties.” *Welch*, 342 S.C. at 313, 536 S.E.2d at 425. Here, the jury provided justice between the parties by awarding damages it allocated individually to BFS based upon BFS’s

¹⁸ Plaintiffs maintain BFS is not entitled setoff “by operation of law” because this is not a setoff situation, but one involving distinct damages awarded against an individual, “non-jointly liable” defendant (BFS) on different claims (breach of warranty and strict liability v. negligence). This determination unquestionably remains within this Court’s discretion. In other words, if the Court agrees this is not a setoff situation because (1) BFS is not a joint tortfeasor or (2) prior settlements involve compensation for a different injury from the one tried to verdict, then the Court should deny BFS’ Motion because there is no setoff as a matter of the only law upon which BFS’ Motion relies (S.C. Code § 15-38-50). Although not referenced by BFS in its Motion, BFS is also not entitled setoff under the “equitable, common law” approach either. Under this approach, the Court should exercise its discretion to setoff a verdict only “when necessary to provide justice between the parties”. Here, setoff is not necessary to provide justice between these parties as demonstrated in the arguments below.

¹⁹ 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.”).

²⁰ The South Carolina Supreme Court recently opined that regardless of whether a defendant is entitled setoff “at common law or under [the Act], any reduction in the judgment must be from a settlement for the same cause of action. *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (emphasis added) (citing *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (citing *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action)).

individual liability. As such, the jury's verdict²¹ is not a duplicative, or "windfall", recovery and fairness demands BFS be held accountable for the damages attributed to it.

At the end of the day, it's BFS who bears the burden of proving that setoff is warranted, and if so, what portion of a prior settlement is attributable to the claims for which BFS is liable. As demonstrated below, it's impossible for BFS to meet this burden because any setoff, under any standard, is inappropriate – period.

ARGUMENT

I. BFS'S Motion is Procedurally Improper Because BFS Did Not Move to Reconsider the Court's Final Order

By issuing a final order entering judgment against BFS in the same amount awarded by the jury, this Court found BFS was not entitled to any setoff and denied BFS's pre-trial and post-trial Motions' seeking setoff.²² See Exhibit F; *Smith*, 397 S.C. at 471-472, 724 S.E.2d at 190 (noting "before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . .")(emphasis added).

Because the Court's Order, which declined to setoff to anything, is the final order "ending" the case, BFS was required to file a Rule 59(e) Motion to reconsider this Order within ten days of its issuance if it disagreed with the Court's ultimate determination. See Exhibit F, p. 1 (noting the Order "ended" the case); *Cheap-O's Truck Stop*, 350 S.C. at 604-605, 567 S.E.2d at 518 (acknowledging the finality of a Form 4 Order and indicating "absolutely nothing remains to be done by [the Court] after the signing of the order.")

²¹ For ease of argument, Plaintiffs sometimes refer to "the jury's verdict" throughout this Memorandum. Plaintiffs' note the jury's verdict is now a final judgment as stated in this Court's September 22, 2016 Order, and thus, any reference to the "the jury's verdict" is also a reference to this Order.

²² BFS' Motion in Limine (Exhibit "A"), filed August 28, 2016, and this Motion, filed September 7, 2016, both, *albeit* confusingly, reference "apportionment of damages" or "setoff".

(emphasis added); *see also* *Zivitz*, 279 F.3d at 539 (finding a Rule 59(e) Motion is an appropriate vehicle to request a setoff of a jury verdict). BFS failed to do so, and as such, BFS is now procedurally precluded from requesting either (a) this Court alter or amend any aspect of its Order or (b) this Court rule on its “setoff” Motions. The Court already ruled and the final judgment the Court ruled on stands.

II. BFS is Not Entitled Setoff Because BFS is Not a “Joint Tortfeasor”. Rather, BFS Owed Independent Obligations to the Plaintiffs, Arising from an Independent Contract, the Breach of Which Resulted in Independent Damages.

This Court should deny BFS’s Motion for Setoff because setoff is, as a matter of law, only available to “joint tortfeasors” which, as a matter of both law and fact, BFS is not.

A.) Setoff is Only Available to “Joint Tortfeasors”

Section 15-38-50 of the South Carolina Contribution Among Tortfeasors Act (the “Act”) provides the following:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added).

By virtue of the Act’s title as well as the language of the section cited above, the Act only applies to joint tortfeasors (i.e., “two or more persons liable in tort for the same injury.”).

*Id.*²³ South Carolina courts, as well as courts throughout the nation, interpret and apply the Act subject to this limitation, making it clear a party seeking setoff must first qualify as a “joint tortfeasor” to be entitled setoff as a matter of law. Order on Post-Trial Motions at 2, *Atkinson v. Orkin Exterminating Co.*, 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) (“Atkinson Order”)²⁴ (finding non-settling defendant, Orkin, was not entitled setoff regarding a jury’s award on a breach of contract claim because no actions of settling defendant, Terminix, could be related to Orkin’s conduct in regard to its contract with Plaintiffs), *rev’d on other grounds*, *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 172, 604 S.E.2d 385, 393-94 (2004) (finding the trial judge erred in treating Orkin and Terminix as “joint tortfeasors” and reducing negligence verdict against Orkin by amount of Terminix settlement).²⁵ This is not the case here, and thus, the Court’s analysis can end here.

B.) BFS is Not a Joint Tortfeasor Because BFS is Independently Liable for its Independent Obligations

First, BFS does not, and cannot, qualify as a “joint tortfeasor” because the jury found BFS liable in contract and awarded damages based upon BFS’s failure to fulfill its contractual

²³ 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.”). Because the Act is in derogation of the common law, it must be strictly construed. *Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989) (noting that a particular act, being in derogation of the common law, must be strictly construed).

²⁴ The Atkinson Trial Court Order is attached hereto as Exhibit “H”.

²⁵ See *Mercy Medical Center v. Julian*, 429 Md. 348, 56 A.3d 147 (2012) (One who is not determined a joint tortfeasor is not subject to contribution under the Maryland Uniform Contribution Among Joint Tortfeasors Act); *Gouty v. Schnepel*, 795 So.2d 959, 965 (Fla. 2001) (“[T]he applicability of the setoff statutes is predicated on the existence of other tortfeasors who are liable for the same injury. . .”); *Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203 (Az. Ct. App. 1993) (noting Arizona courts refuse to require a setoff of settlement amounts where the liability of the defendants is several rather than joint and several); *McKinley v. Willow Const. Co., Inc.*, 693 P.2d 1023 (Colo. Ct. App. 1984) (In action against construction company for negligence and breach of contract resulting from defects in roof constructed during remodeling of plaintiff’s property, in which contractor filed third-party complaint against manufacturer of trusses used in roof, contractor was not entitled to contribution from manufacturer since manufacturer and contractor were not “joint tortfeasors” pursuant to the Act inasmuch as contractor was liable to plaintiffs upon breach of contract theory and liability was imposed on manufacturer because of negligence); see also *Lauth v. Olsten Home Healthcare, Inc.*, 678 So.2d 447, 448 (Fla. 2d DCA 1996) (“When a plaintiff has separate claims, a setoff is inappropriate.”).

obligations.²⁶ There is no way any other defendant can be held liable for BFS's contractual obligations owed to Plaintiffs. There is no way any payments received by other defendants can relieve BFS of its independent liability by failing to fulfill its independent obligations. Thus, there is no way BFS is entitled setoff in this situation, and prevailing South Carolina precedent agrees.

In *Atkinson versus Orkin Exterminating Company, Incorporated*, for example, the plaintiffs sued multiple parties seeking recovery for structural damage to their home caused by termite infestation. 361 S.C. 156, 159-60, 604 S.E.2d 385, 387 (2004). In the underlying case, the plaintiffs asserted claims of negligence and breach of contract against all parties, including Orkin and Terminix, both of whom provided termite bonds and termite treatment-related services to the residence.²⁷ *Id.* at 160-61, 604 S.E.2d at 387-88. Ultimately, the plaintiffs settled with Terminix and proceeded to trial against Orkin on their negligence and breach of contract causes of action. *Id.* at 160-61, 604 S.E.2d at 387-88. At trial, Orkin admitted it breached its contract with plaintiffs and the jury returned a verdict finding Orkin liable for breach of contract accompanied by a fraudulent act, awarding plaintiffs \$6,191 in compensatory damages and \$786,500.00 in punitive damages. *Id.* at 160-63, 604 S.E.2d at

²⁶ As an initial matter, the jury returned a general verdict against BFS on Plaintiffs' breach of warranty and strict liability claims. Accordingly, Plaintiffs may rely on either claim (breach of express warranty, breach of implied warranty or strict liability) in the context of analyzing the appropriateness of setoff under the Act. Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury, the verdict stands. *Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985).

²⁷ Before the Atkinsons purchased their home in 1995, Orkin conducted a routine inspection and reported that the residence was free of termites and related damage. *Id.* at 161, 604 S.E.2d at 388. The previous owners had purchased and maintained a termite bond from Orkin since 1972 and this termite bond included a "lifetime termite damage guarantee" which contained a transferability provision allowing original purchasers to transfer the bond to subsequent purchasers. *Id.* at 160, 604 S.E.2d at 388. After moving into their home, the Atkinsons attempted to transfer the Orkin termite bond to them pursuant to this transferability provision; however, Orkin refused. *Id.* at 160-61, 604 S.E.2d at 387. Because Orkin refused to honor the transferability provision, the Atkinsons proceeded to obtain coverage from Terminix. *Id.* at 161, 604 S.E.2d at 388. Thereafter, the Atkinsons discovered termites and termite-related damage in their residence and commenced the underlying action seeking recovery for this damage. *Id.*

388-89. The jury also found Orkin liable in negligence, awarding plaintiffs \$69,068.33. *Id.* Post-trial, Orkin moved the court to setoff the jury's verdicts by the settlement received from Terminix. *Id.* at 163, 604 S.E.2d at 389. Notably, the Trial Court refused to setoff anything from the jury's breach of contract verdict, finding Orkin was not entitled setoff on this verdict as a matter of law:

Defendant filed a Motion for Setoff dated May 29, 2001. The Motion seeks a setoff in the sum of [\$31,111.75] paid by Terminix to Plaintiffs (the Motion is not addressed to a particular cause of action. Defendant's counsel's cover letter states setoff is sought as to the award on negligence).²⁸ In exchange for said sum Plaintiffs executed a General and Final Release of all claims dated October 22, 1998. As to the jury's award based on Breach of Contract accompanied by a Fraudulent Act, Defendant is not entitled any setoff. No actions of Terminix were, nor could they be, related to Defendant's conduct in regard to its contract with Plaintiffs. Terminix could in no way be held liable for the contractual obligations Defendant owed to Plaintiffs. No payment by Terminix can relieve Defendant of its contractual obligations to Plaintiffs as determined by the jury. . . .

Atkinson Order at 2 (emphasis added).

However, because the Trial Court viewed Terminix and Orkin as "joint tortfeasors" in connection with the jury's negligence verdict, the judge reduced this verdict against Orkin by the amount Terminix paid in settlement. Atkinson Order at 2-3. On appeal, our Supreme Court reversed, finding:

[T]he trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's [negligence].

Atkinson, 361 S.C. 156, 159-60, 604 S.E.2d 385, 387 (emphasis added).

The *Atkinson* opinions are important for several reasons. First, these opinions establish one must qualify as a "joint tortfeasor" in order to be entitled setoff as a matter of law. Second,

²⁸ BFS's Motion similarly fails to address a particular cause of action.

these opinions establish separate claims are separately considered in determining whether one qualifies as a “joint tortfeasor”. Third, these opinions establish a defendant found liable for breaching its contractual obligations is not a “joint tortfeasor.” Fourth, these opinions establish defendants which could be found liable in tort are not actually “joint tortfeasors” (unless, and until, its proven they “contributed” to each other’s tortious conduct).

Applying the foregoing analysis to the instant case leads to two undeniable conclusions: (1) BFS is not entitled to set off the jury’s award based on breach of warranty because this is a contractual claim for which BFS is independently liable;²⁹ and (2) BFS is not entitled to set off the jury’s award based on strict liability because, although a “tort”, this is a tort for which BFS is also independently liable. *Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 264 (4th Cir. 1998) (“In strict liability, the plaintiff need not show fault, but only prove a product defect”) (citations omitted)(emphasis added); *Boykin v. China Steel Corp.*, 73 F.3d 539, 544 n.4 (4th Cir. 1996) (“Bergesen is also not a joint tortfeasor because its liability for an unseaworthy vessel is liability without fault.”) (emphasis added); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 540-41, 462 S.E.2d 321, 326-27 (1995) (“This result is consistent with the principles of strict liability since the manufacturer is not held as an insurer against all losses caused by the product but rather is to be held responsible only for damages attributable to some failure of the product to perform with reasonable safety in its normal environment.”) (citations omitted).

In other words, BFS does not qualify as a “joint tortfeasor” on either claim because BFS, alone, is liable for its breach of warranty and no other defendant potentially liable for

²⁹ *Mauldin v. Milford*, 127 S.C. 508, 522, 121 S.E. 547, 552 (1924) (“[A]n action for breach of warranty sounds in contract.”); *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (“Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements”).

strict liability “contributed to” BFS’s actual strict liability. These are the exact issues presented in the *Atkinson* case – a defendant who neither qualifies as a “joint tortfeasor” in contract (because breach of warranty is a contract action,³⁰ not a tort; and, without a tort, there can be no tortfeasor) nor qualifies as a “joint tortfeasor” in tort (because no one is as “at fault” for strict liability;³¹ and, without fault, there can be no setoff based on potential “contributions to” fault). See *Atkinson, supra*. Thus, just as setoff was wholly inappropriate in *Atkinson*, so is setoff wholly inappropriate here.

C.) BFS Contractually Assumed Sole Responsibility for All Damages Awarded That are Attributable to its Conduct

The inappropriateness of setoff is compounded by the fact BFS contractually assumed sole responsibility for all damages attributable to its failures, regardless of whether these failures arose “in tort” or “in contract”. BFS’s contractual obligations, contained within a purchase order BFS admittedly accepted, and an express warranty BFS admittedly provided, state:

[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee for any costs or expenses attributable to errors in [BFS’s] performance.

Jt. Ex. 44(a) (emphasis added).

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.

Jt. Ex. 188 (emphasis added).

³⁰ See *Mauldin and East River, supra*.

³¹ In a strict liability action, apportionment based upon fault is impermissible as this tort theory does not contain an element of fault. See, e.g., *Talkington and Bragg, supra*; see also *Gasque v. Heublein, Inc.*, 281 S.C. 278, 315 S.E.2d 556, 558 (1984) (rejecting argument that negligence and strict liability are so closely intertwined that it should depart from “two issue rule” in products liability cases and concluding that there are “obvious differences between the two theories, i.e., the different quantum of proof required and the fact that one’s origins are statutory while the others are at common law.”). This is in contrast to negligence actions where liability is allocated among joint tortfeasors according to percentages of comparative fault.

BFS voluntarily agreed to these terms, intentionally undertook the obligation to fulfill these terms, and these terms unambiguously indicate BFS, individually, is responsible for all cost and expenses associated with the defective windows it supplied to One Belle Hall (strict liability) and BFS's error in failing to perform its contractual obligations (breach of warranty). BFS cannot, on one hand, claim it is entitled to setoff on damages awarded for its breach of warranty and strict liability when, on the other, BFS contractually assumed sole responsibility for these very damages it seeks to setoff. *See, e.g., Applied Co. v. United States*, 144 F.3d 1470, 1476 (Fed. Cir. 1998) ("it is well settled that the government retains its setoff right unless there is some explicit statutory or contractual provision that bars its exercise") (emphasis added). Stated differently, BFS waived its purported right to setoff by accepting contractual provisions purporting to eliminate this right. *See, e.g., Sanford v. S.C. State Ethics Com'n*, 385 S.C. 483, 685 S.E.2d 600 (2009) (holding waiver is the voluntary and intentional relinquishment of a known right).³²

Not only did BFS waive its purported right to setoff by accepting these contractual provisions, these contractual provisions demonstrate why it's impossible for BFS to prove it's otherwise entitled to setoff under the Act. According to these provisions, BFS assumed sole liability which means there is no joint liability, and if joint liability does not exist, any right to setoff under the Act does not exist.

D.) BFS, Itself, Maintains it is Not a Joint Tortfeasor Because the Damages the Jury Found BFS Liable for are "Clearly Divisible"

Even BFS claims there is no joint liability for the damages awarded against it because any damages BFS is "found liable" for "clearly divisible" from those attributable to other,

³² In fact, BFS's request for setoff, after admitting at trial it is bound by these contractual terms eliminating its right to setoff, amounts to yet another breach of its contractual obligations.

previously-settled defendants. As stated by BFS in its first request for an “Apportionment of Damages” (i.e., setoff):

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** (i.e. damages related to roofs, HVAC, electrical, plumbing, etc.). BFS **cannot be held jointly and severally liable** for all encompassing damages awarded to Plaintiffs.

(Def. Mot. in Lim. at 5) (emphasis added).

III. **BFS Tried Setoff By Consent, and Consequently, Cannot Seek Setoff Now**

BFS already received the setoff it seeks because the manner in which this case was tried allowed the jury to “setoff” any damages it did not allocate individually to BFS. Stated differently, allocation of fault, allocation of damages and setoff were tried by the consent of the parties.³³ In such trial by consent situations, our courts follow a simple rule – a party cannot complain about a result when it acquiesced to the result being reached.

In *McCurry versus Keith*, for example, our Court of Appeals confronted a scenario in which a trial court awarded a setoff based upon how the case was ultimately presented at trial. 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997). The case, brought by the plaintiff for recovery of video poker gambling losses incurred at defendants’ poker establishment, concluded with the trial court finding plaintiff sustained gambling losses of \$8,560, but also earned gambling winnings of \$5,000. *Id.* at 443, 481 S.E.2d at 167. Therefore, the trial court awarded plaintiff \$3,560. *Id.* Subsequently, plaintiff made a Rule 59(e) motion requesting the trial court reconsider its order, arguing the trial court erred by providing the defendants a setoff of \$5,000 when the defendants failed to formally request setoff. *Id.* The trial judge denied the motion, holding plaintiff “waived her right to contest that any type of setoff should be allowed”

³³ Whether an issue is tried by consent is a matter within the sound discretion of the trial court (whose judgment will only be reversed for an abuse this discretion). *Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980).

because “she brought up her winnings and testified about her winnings without any objection.”

Id. The Court of Appeals agreed:

[W]e believe McCurry waived her right to object to the trial judge’s consideration of her winnings. The Keiths’ attorney mentioned McCurry’s winnings in her opening statement and questioned McCurry about her winnings without objection. This constituted a waiver of the right to contest McCurry’s winnings on appeal. *See State v. Somerset*, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981) (noting that party objecting to course of argument must object). Moreover, McCurry’s counsel questioned McCurry about her winnings on direct examination. If gross losses had been the only issue, winnings would not have been relevant. Finally, even had we accepted Appellant’s argument that the \$5,000 setoff should have been pled, we would have held the issue tried by implied consent pursuant to Rule 15(b), SCRCP.

Id. at 446, 481 S.E.2d at 168-69 (emphasis added); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (Supreme Court denying setoff on the ground that a previous settlement “was understood by the parties” to cover damages for a different period than the damages sought at trial.).

Here, like *McCurry*, the issue of set off was tried by consent to the jury. The jury understood One Belle Hall experienced multiple defects and suffered damage associated with these defects because the parties jointly introduced evidence, including expert reports, photographs, and repair estimates, allocating fault and damages amongst multiple defendants due to these multiple defects.³⁴ (*See, e.g.,* Jt. Exs. 300, 301, 302, 304.3, 305, 325); *see also Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436, 439-40 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980) (noting implied consent is found where the parties recognized that the issue

³⁴ The report of Plaintiffs’ liability expert, Dr. Whitlock, and the repair estimates prepared by both Plaintiffs’ and BFS’s experts reference multiple defendants, the individual problems caused by these defendants, and the different costs associated with the repair of these different problems. For example, Moore’s repair estimate provided a total repair cost for One Belle Hall of over 14 million dollars, separating each building component and damage component individually.

entered the case at trial and acquiesced in the introduction of evidence on that issue without objection).

BFS's counsel expressly asked the jury to allocate fault and damages based upon this evidence, told the jury "it is all about money in this lawsuit", and further, implied that Plaintiffs had already been paid by "over forty" defendants. (Tr. Transcr. 21:10-12; 112:14-15; 113:5-15. In BFS's counsel's first breath, she referenced a multitude of defendants and informed the jury that the only reason "we are here is because Mr. Lucey and I could not come to an agreement and ou[r] clients thereby can't come to any agreement as well." (Tr. Transcr. 21:10-12) (emphasis added). It would belittle the jury's intelligence to assume that twelve, educated individuals did not connect the dots BFS's counsel repeatedly begged the jury to connect: each and every one of the "40 plus" defendants originally in this case, except for BFS, "came to an agreement with", and therefore, *paid* plaintiffs. (Tr. Transcr. 21:10-12; 25:24-26:5; 26:10-32:14).

BFS's counsel then proceeded to: (1) ask the jury to consider the "many installation issues" and "other problems" plaguing One Belle Hall; (2) ask the jury to consider the amount of water intrusion it could attribute to the windows as opposed to these "other problems"; and (3) ask the jury to consider the other parties who were allegedly more responsible for these "problems" because "BFS was just the middleman".³⁵ (Tr. Transcr. 25:24-26:5; 26:10-32:14; 94:13-95:7; 100:19-102:8; 117-21:118:6). Per BFS, "the evidence showed" it did not install, design, manufacture, inspect or maintain the windows, and thus, it could not be held liable for

³⁵BFS's entire case relied upon several "questions" it asked the jury to consider first in its opening statement, and then again, in its closing argument after the jury heard and saw the evidence. Each one of these questions BFS asked the jury to consider was asked in an attempt to get the jury to award Plaintiffs as little as possible because Plaintiffs were already paid by former defendants and these former defendants were the ones at fault – not BFS.

the defective windows or related damages. The liability for damages associated with these leaky windows, BFS argued, lies with the “other men” who did all these things. *Id.*

In response, Plaintiff’s counsel discussed the liability of these “other men” BFS continually referenced and asked the jury to hold BFS accountable for its share of its liability:

We all know what is going on here. The manufacturer was peddling cheap windows to make a buck. TCR was using cheap windows to make a buck. [BFS] was reselling cheap windows to make a buck. But [OBH] homeowners are they victim and [BFS doesn’t] get a get out of jail free card. They are part of that transaction. They facilitated TCR using these cheap windows. They supplied them, they sold them. Hold them responsible.

(Tr. Transcr. 123:10-18).

Thus, at the end of the day, the jury knew Plaintiffs suffered damages of over 14 million dollars, the jury knew the repair cost for “other problems” were included in this figure, the jury knew “other parties” already paid Plaintiffs portions of this figure, and with this knowledge, the jury did exactly what BFS asked it to do - it found BFS liable for its share. In other words, the jury’s \$2,163,493 damage award against BFS is in addition to any amount received from “other parties” for “other problems” and this is supported by the overwhelming, and unchallenged, evidence in record. In fact, because “other parties” did settle for “other problems”, Plaintiffs only sought damages attributable to BFS at trial and introduced a “window-only” estimate, which excluded “all other damages at the project” and included only the cost to replace the windows. This estimate amounted to \$3,500,000³⁶ – given the jury’s award of \$2,163,493, the jury already provided BFS a setoff of \$1,336,507 on window replacement, alone, and BFS, alone, is liable for replacing the windows.

There is simply no basis for setoff under these circumstances, where the jury is asked to allocate fault and damages among several parties, and then does so, based upon evidence the

³⁶ The \$4.7 million estimate provided by Plaintiffs included the cost of repairing the consequential damages

presented. *See Zivitz, supra*. It was left to the jury to determine whether BFS was liable. It was left to the jury to determine what damages it attributed to BFS individually. BFS agreed to allow the jury to make these determinations,³⁷ and thus, it strains credibility for BFS to now argue Plaintiffs somehow recovered twice for the same damages. The evidence presented, the arguments of counsel, the instructions to the jury, and the clear language of the verdict form are all consistent with the result obtained. To apply yet another set off would be to ignore the jury's verdict and the overwhelming evidence in the record.

IV. BFS Cannot Challenge the Jury's General Verdict

Additionally, BFS is precluded from further dissecting the jury's verdict given BFS stipulated to the verdict form and failed to request an interrogatory inquiring into any aspect of the verdict before the jury was excused. (Exhibit C); *see also Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) ("Appellants waived appellate review [trial court's failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter.").

³⁷ Notably, when responding to Plaintiffs' directed verdicts motions at the close of all evidence, BFS's counsel indicated:

And the breach of warranty we would argue that there has been sufficient evidence the windows are defective by manufacturing purposes as opposed to having some kind of damage that the windows arrived on site until the time that they currently exist. We feel that there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination. There is also a question as far as damages go and the damages would be applicable to all three of those causes of action. There is a question on [if] the windows have caused damage then how much damage have the windows caused. . . So we believe there is a question of fact and plenty of evidence that could be weighed either way as to damages which would be applicable to all three causes of action.

(Tr. Transcr. 49:18-51:1) (emphasis added).

V. Setoff is Not Necessary To Provide Justice Between the Parties

Although the foregoing proves dispositive, and assuming BFS can maintain it is entitled an equitable right to setoff after relying solely upon the Act, an “equitable” setoff is also inappropriate here because the jury’s verdict is fair – the jury awarded damages it allocated individually to BFS based upon BFS’s individual fault. *Rutland*, 390 S.C. at 86, 700 S.E.2d at 456 (When viewed through the lens of equity, a trial court’s discretion to set off a judgment should only be “exercised when necessary to provide justice between the parties.”) (emphasis added).

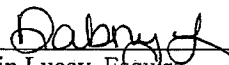
As reflected by the verdict, Plaintiffs succeeded in providing credible evidence that their damages resulted from the unique actions, and inactions, of BFS. Plaintiffs called BFS area vice president, Bob Lanier, who confirmed: (a) BFS promised quality, defect free windows; (b) BFS promised quality, workmanlike services; and (c) BFS promised to pay, at its own expense, all damages related to its supply of inferior products or substandard services. Lanier, as well as other BFS witnesses, confirmed BFS did, in fact, supply inferior products and substandard services. Per BFS, it performed no quality control related to the windows, it verified no aspect of the windows performance characteristics, it reviewed no window certifications, labels or manufacturer data, and it “could not recall” anything related to its actual supply of the windows because it could only recall providing the documents containing its promises. Additionally, Lanier agreed leaky windows are not quality products which pose a danger to persons and property and BFS’s expert, David VanDommelen, opined these windows are leaking and such leakage is “abnormal”. Considering the foregoing testimony of BFS, especially when combined with the testimony of Plaintiffs and Plaintiffs experts, there is no question as to BFS’s liability – the jury agreed.

The jury also agreed as to what BFS, individually, was liable for from a damages perspective. All defendants, problems, repair estimates and finger-pointing considered, the jury awarded \$2,163,493 in damages it allocated to BFS based upon BFS's own actions and omissions. The Plaintiffs' recovery, therefore, is not duplicative of any funds received in connection with previously-garnered settlements and, most certainly, does not amount to any windfall. To the contrary, any setoff of the damages the jury awarded Plaintiffs as a result of BFS's conduct would result in a windfall to BFS by allowing it to avoid its contractual obligations to Plaintiffs. *See, e.g. Murphy v. United States*, 836 F. Supp. 350, 351 (E.D. Va. 1993) ("A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall."). Simply put, set off is not required to provide justice between these parties because justice has been provided.

CONCLUSION

Based upon the foregoing, this Court should deny BFS's Motion because (1) it is procedurally precluded; and, (2) BFS is not entitled setoff for a number of reasons, including the fact (a) BFS is not a "jointfeasor"; (b) BFS contractually assumed sole responsibility for all damages awarded; (c) BFS admits Plaintiffs' damages are "divisible" and capable of individual allocation; (d) BFS asked the jury to allocate fault and damages amongst several parties; (e) BFS waived its right to challenge the jury's verdict; and (f) setoff is not necessary to provide justice between the parties.

JUSTIN O'TOOLE LUCEY, P.A.



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Attorneys for Plaintiffs

November 16, 2016
Charleston, South Carolina

Exhibit "E"

**9/7/16 Dyer letter to Clerk of Court filing Defendant's Notice
of Motion and Motion to Compel and for Motion to
Determination of Setoff**

914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

**KERNODLE
COLEMAN**
ATTORNEYS AT LAW

C. Davi Dyer, Esquire
ddyer@kernodlelaw.com

September 7, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: *One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all other similarly situated v. Trammel Crow Residential, Builders FirstSource - Southeast Group, LLC et. al.,*
Case No.: 2012-CP-10-7594
KC File No.: 6002-194

Dear Ms. Armstrong:

Enclosed is an original and one copy of a *Notice of Motion and Motion to Compel and Motion for Determination of Setoff*, together with a Motion and Order Information Sheet and our firm check in the amount of \$25.00 in payment of the required fee. Kindly file the original and return a date-stamped copy of the Motion to me in the envelope provided for your convenience.

By copy of this letter, I am serving opposing counsel with a copy of same.

Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

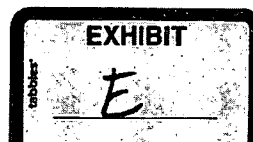
KERNODLE COLEMAN

C. Davi Dyer

CDD/mlj
Enclosures

cc: Via E-Mail only w/encl.
Justin O. Lucey, Esquire / Dabny Lynn, Esquire

kernodlelaw.com



ROA_04575

Exhibit "H"

Atkinson Order

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

JUDGMENT IN A CIVIL CASE
1997-CP-10-000775

ATKINSON, BERT C ETAL

VS. ORKIN EXTERMINATING COMPANY INC

ATKINSON, STEPHANIE S ETAL

PLAINTIFF(S)

DEFENDANT(S)

- () 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: () RULE 12(B), SCRCP; () RULE 41(A), SCRCP (VOL.
NONSUIT); () RULE 43(K), SCRCP (SETTLED); () OTHER-
- () ACTION STRICKEN: () RULE 40(J) SCRCP; () BANKRUPTCY; () BINDING
ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM, VACATE OR MODIFY
ARBITRATION AWARD; () OTHER

IT IS ORDERED AND ADJUDGED: () SEE ATTACHED; () JUDGMENT BY COURT
SEE ATTACHED

DATED AT CHARLESTON, SOUTH CAROLINA, THIS 04TH DAY OF JUNE , 2001

J. C. Hayes
PRESIDING JUDGE

THIS JUDGMENT WAS ENTER ON THE 07TH DAY OF JUNE , 2001 AND A COPY
MAILED FIRST CLASS THIS 13TH DAY OF JUNE , 2001 TO ATTORNEYS OF

RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

SIMONS, KEATING L III
TURNIPSEED, SARA S

BELSER, CLINCH H JR
WATSON, RICHARD B

GEER, BRYSON M

SINKLER, G DANA

ATTORNEY(S) OR PRO SE(S)

ATTORNEY(S) OR PRO SE(S)

Julia J. Anyshong
CLERK OF COURT

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6-7-01

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
BERT C. ATKINSON AND)
STEPHANIE S. ATKINSON,)
Plaintiffs,)
v.)
ORKIN EXTERMINATING CO.,)
INC.)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

ORDER

Civil Action Number 97-CP-10-

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This case was tried to a jury in Charleston the week of May 14, 2001. The jury returned verdicts for Plaintiffs on Friday, May 18, 2001. Counsel for Defendant requested and was granted ten days to file post-trial motions. Defendant timely filed a Motion for New Trial and a Motion for Set-Off both dated May 29, 2001. This Order disposes of the Motion for New Trial and Defendant's Motion for Set-Off.

This Order will also set forth the Court's Gamble (Gamble v. Stevenson, 305 S.C. 113, 406 S.E. 2d 350 (S. Ct. 1991) review of the punitive damages award as to Defendant's grounds 18 and 19 (and to a degree 13) assert the punitive damages award is excessive and indicates passion, prejudice, and caprice on the part of the jury.

As to grounds 1 through 17, Defendants Motion for a New Trial is denied. Each of the issues alleged as error by the trial judge have been ruled on during the course of the trial, and the Court believes its rulings were proper. Each of the issues asserted were fully argued and fully considered during trial. Addressing each ground with particularity at this time is unnecessary and the Court's

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rulings during the trial are herein adopted as if set forth herein. The Court hereby adopts as its rulings on the Motion for New Trial its earlier rulings on the grounds raised post-trial.

As to the award of punitive damages (Grounds 13, 18 and 19). The Court finds it to not be excessive nor the product of passion, prejudice, or caprice. Defendant cannot in good conscience argue that the award in any way is not reflective of Defendant's ability to pay. The record contains more than sufficient, clear and convincing evidence of the Defendant's ability to pay, its willful disregard for the rights of Plaintiffs, its awareness or concealment, and its culpability. The punitive damages award will likely deter Defendant and others from future like conduct; it is reasonably related to the harm experienced by Plaintiffs and, the award is not disproportionate in any way to the severity of Defendant's conduct in its dealings with Plaintiffs.

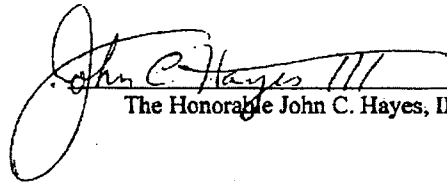
Defendant filed a Motion for Set-Off dated May 29, 2001. The Motion seeks a set-off in the sum of Thirty-One Thousand One Hundred Eleven and 75/100 Dollars (\$31,111.75) paid by Terminix to Plaintiffs (the Motion is not addressed to a particular cause of action. Defendant's counsel's cover letter states set-off is sought as to the award on negligence). In exchange for said sum Plaintiffs executed a General and Final Release of all claims dated October 22, 1998. As to the jury's award based on Breach of Contract accompanied by a Fraudulent Act, Defendant is not entitled to any set-off. No actions of Terminix were, nor could they be, related to Defendant's conduct in regard to its contract with Plaintiffs. Terminix could in no way be held liable for the contractual obligations Defendant owed to Plaintiffs. No payment by Terminix can relieve Defendant of its contractual obligations to Plaintiffs as determined by the jury, nor can Terminix's payment be applied to the sting Defendant is to feel from the jury's punishment by way of an award of punitive damages.

As to the award of negligence, such award is more general in nature and Terminix's conduct

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could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action. Therefore, Defendant is entitled to set-off in its favor against the jury's damages award based on Defendant's negligence.

IT IS SO ORDERED.


The Honorable John C. Hayes, III # 3

Dated this 4th day of June, 2001
Gaffney, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
One Bell Hall Property Owners	)	Civil Action No. 2012-CP-10-07594
Association Inc. and Marvin T. Meek	)	
and Frances E. Hill, individually, and	)	
on behalf of all others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	<u>Memorandum in Support of</u>
	)	<u>Defendant's Motion to Compel</u>
vs.	)	<u>Production of Settlement Agreements</u>
	)	<u>and Motion for Setoff</u>
Builders FirstSource Southeast Group	)	
LLC, et al.,	)	
	)	
Defendant.	)	
	)	

Defendant Builders FirstSource Southeast Group LLC ("BFS") submits this memorandum in support of its Motion to Compel and Determination for Setoff. As set forth in the Motion and below, this Court should grant the motion and setoff the amounts received by Plaintiffs from settling co-defendants from the verdict rendered against BFS.

Factual Background

In the Third Amended Complaint, Plaintiffs sought recovery on a joint and several basis for the same injury against BFS and other specified co-defendants under strict liability and breach of express and implied warranty causes of action. On 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 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.¹ Plaintiffs’ set forth the same injury against all defendants—“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 sought from all defendants, jointly and severally. See Third Amended Complaint ¶ 118.

Prior to trial, Plaintiffs settled the strict product liability and breach of warranty causes of action with each co-defendant. The amount of the settlement with each co-defendant is

¹ Plaintiffs’ asserted their breach of warranty claim against BASF, TAMKO, ESP, Trammell Crow Residential Company, Trammell Crow Residential Carolina, TCR Construction, TCR Development, TCR Carolina Properties Inc., Belle Hall Direct 101, LP, TCR RLD Condominiums, Inc., TCR SE Construction, Inc., TCR SE Construction II, Inc., TCR Southeast, Inc., Tauer Consulting Company, Inc., Halter Properties, LLC, Halter Realty Group, LLC, Cline Design Associates, P.A, Gary D. Cline, GCI Consultants, LLC f/k/a Glazing Consultants, Inc., Stewart Engineering, Inc., ABG Caulking & Waterproofing of Morristown, Inc., Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc., Budget Mechanical Plumbing, Inc., Century Fire Protection, LLC, Coastal Lumber and Framing, LLC, Advanced Building Products & Services, LLC, Dobson Brothers Exterminating Co., First Exterior, LLC, Flooring Services, Inc., General Heating & Air Conditioning Company of Greenville, Inc., Jimmy Warner, Warner Heating & Air, GWC Roofing, Inc., Southcoast Exteriors, Inc., IES Residential Inc. f/k/a Houston Stafford Electrical Contractors, LP, J. Correa Electrical Company, LLC, KMAC of the Carolinas, Inc., P&P Metal Sales Co., Inc., Pleasant Places, Inc., RS General Contracting, LLC f/k/a RS Custom Homes, LLC, Southern Specialties, Inc., Structural Contractors South, Inc., Superior Construction Services, Inc., VNS Corporation, individually, and d/b/a Wholesale Building Products, Billy Gray d/b/a United Builders, LLC, What Don’t We Do.

unknown despite repeated requests that Plaintiffs disclose the amount of each settlement and the filing of a pending motion to compel production of the settlement agreements. BFS understands the settlement amounts taken together far exceed the judgment of \$2,163,000.00 rendered by the jury against BFS on Plaintiffs' strict liability and breach of express and implied warranty causes of action at trial.

Legal Argument

BFS is entitled to a setoff as a matter of law of the amounts received by Plaintiffs from each of the settling co-defendants. Set-off is required by statute and by common law equitable principles.

I. S.C. Code Ann. §15-38-50 requires the Court to apply the settlements of co-defendants as a set-off against the verdict against BFS.

Section 15-38-50 requires setoff when a plaintiff settles with another tortfeasor in the action. It states:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, **but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater;** and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Id. (emphasis added). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." Smith v. Widener, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012) (applying S.C. Code Ann. § 15-38-

50(1) (2005)). Therefore, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to. compensate the same plaintiff on a claim for the same injury. Widener, 397 S.C. at 471-72, 724 S.E.2d at 190; Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998).

When the settlement is for the same claimed injury, as is the case in this matter, the non-settling defendant's right to a setoff arises by operation of law. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999). Under this circumstance, "[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off." Widener, 397 S.C. at 472, 724 S.E.2d at 190; Oliver, 335 S.C. at 113, 515 S.E.2d at 272; see also Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (holding that Section 15-38-50, which discharges tortfeasor to whom release is given from all liability for contribution to any other tortfeasor, 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).

II. Set-off is required as a matter of equity to the extent it is not mandated by S.C. Code Ann. § 15-38-50.

Even if Section 15-38-50 did not require setoff, this Court should still grant the motion under its equitable power. A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action. Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000). "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." Id. at 313, 536 S.E.2d at 425. Allowing this credit

prevents an injured person from obtaining a double recovery for the damage he sustained, for it is “almost universally held that there can be only one satisfaction for an injury or wrong.”

Rutland v. S.C. Dept. of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

III. Both the statutory requirement and common law equitable principles are designed to prevent double recovery by the Plaintiff for the same injury or wrong.

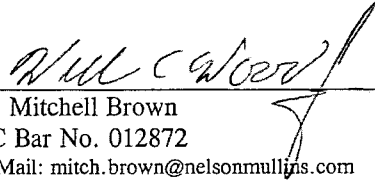
“[T]here can be only one satisfaction for an injury or wrong.” Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000); (internal quotation marks omitted); Collins Music Co., Inc. v. Smith, 332 S.C. 145, 148, 503 S.E.2d 481, 482 (Ct. App. 1998) (denying “double recovery (once from each defendant) for actual damages which are coextensive”); Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990) (per curiam) (“It is a fundamental rule of law in this state that there can be no double recovery for a single wrong.”). “[T]he reason for allowing such a credit is to prevent an injured person from a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong.” Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975); see also Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 304-05, 504 S.E.2d 347, 355 (Ct. App. 1998) (“‘A well-settled general rule is that partial compensation paid by one tort-feasor may be shown by another tort-feasor in mitigation or reduction of damages, **for the reason that a party can have but one satisfaction of his damages.**’”) (quoting 25 C.J.S. Damages § 98(2) (1966) (emphasis added)).

Conclusion

Plaintiff will obtain an unlawful and inequitable double recovery unless this Court grants the setoff as required by statute and the common law. The Court should compel Plaintiffs to produce the settlement agreements as to every co-defendant and set-off the sum of such settlements against the verdict rendered against BFS.

Respectfully submitted,

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November 17, 2016

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

) Memorandum in Support of Builders

) FirstSource Southeast Group LLC's

) Motion for JNOV, New Trial, New

) Trial Absolute, or, in the alternative,

) for New Trial Nisi Remittitur.

BY

JULIE

STRONG

ATTORNEY

FOR

PLAINTIFF

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Defendant Builders FirstSource Southeast Group LLC ("BFS") submits this memorandum in support of its Motion for JNOV, New Trial, New Trial Absolute, or, in the alternative New Trial *Nisi Remittitur*. As set forth in the Motion and below, this Court should grant the motion and enter judgment in favor of BFS or, in the alternative, grant a new trial because the damages awarded by the jury exceed the evidence presented at trial.

I. JNOV should be granted because this Court improperly denied BFS's directed verdict motion and submitted Plaintiffs' claims to the jury.

A motion for JNOV should be granted only if no reasonable jury could have reached the challenged verdict. Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial judge may reverse when a review of the record discloses no evidence which reasonably supports the factual finding necessary to sustain the verdict. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993). While the Court is concerned with the existence of evidence, not its weight, Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003),

and may not decide credibility issues or to resolve conflicts in the testimony or the evidence, Id. at 320, 585 S.E.2d at 274, JNOV is warranted when there is no evidence to support the ruling or where the ruling is controlled by an error of law. Hinkle v. National Cas. Ins. Co., 354 S.C. 92, 579 S.E.2d 616 (2003).

A. Plaintiffs failed to show evidence that they gave the required notice to support their breach of warranty claim.

Plaintiffs' warranty claims, whether express or implied, failed as a matter of law because Plaintiffs failed to give the required notice. It is undisputed that Plaintiffs gave no notice of breach of warranty to BFS prior to filing suit. Giving of "timely notice to the seller" is a required element of proof in a breach of implied warranty claim or express warranty claim. See Brooks v. GAF Materials Corp., 41 F.Supp.3d 474, 482 (D.S.C. 2014)(listing elements of a breach of implied warranty claim); S.C. Code Ann. §§ 36-2-602, 36-2-607(3)(a), & 36-2-714(1) (requiring notice to the seller of breach of warranty). The Court should grant judgment in favor of BFS on the breach of warranty claims.

B. Plaintiffs' strict product liability claim was barred by the statute of limitations.

Plaintiff failed to file its strict liability claim against BFS within three years from the time it knew or should have discovered the existence of its potential claims. Thus, this claim is barred by the statute of limitations. S.C. Code Ann. § 15-3-530(5).

1. The statute began to run when Plaintiffs realized the windows leaked.

Marvin Meek, President of the HOA, drafted an email and sent it to a representative of the builder, Trammel Crow Residential, on December 18, 2010, itemizing "open issues" at One Belle Hall that had been discussed at some earlier time. See December 18, 2010

email, marked as Exhibit 10 to Meek's deposition. The list included "window leaks." Id. During his testimony, Mr. Meek provided unequivocal evidence that the Plaintiffs had notice of window leaks prior to the date of that correspondence and that they believed someone other than themselves should be responsible for remedying those leaks:

Q: And going back to Exhibit 10, that's the December 18, 2010 letter that you wrote to Donna Kruger with respect to TCR?

A: Here it is. Yes.

Q: Mr. Norris spoke about it at length, but I just have a couple questions. The window leaks that you referred to in that letter, do you recall how many windows were experiencing leaks, approximately?

A: No, I can't — I — I couldn't even guess at it.

Q: Were — were the leaks being experienced at windows in all the buildings, or one building, or just a couple of the buildings?

A: I don't recall. I just know there were several owners who were having window leaks of various sorts. I don't recall how many and which ones were.

Meek Deposition at 217:4-21. He continued:

Q: Well, you at least knew of water intrusion — I'm sorry. You at least knew of window leaks at One Belle Hall as of December 18, 2010; isn't that right?

A: I was aware of unit owners having window leaks.

Meek Dep. at 225:2-7; see also Meek at 286:13-25, Meek Dep. at 318:13-320:2.

Under the limitation statute, South Carolina law requires "very little to start the clock." Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998). The discovery rule applies and states that the time begins to run from the date when the injured party knows or reasonably ought to have known that he might have a claim against some party either in contract or in tort. Smith v. Smith, 291 S.C. 420, 426, 354 S.E.2d 36, 40

(1987); Cline v. J.E. Faulkern Homes, Inc., 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004); S.C. Code Ann. §36-3-725(2). The date on which this discovery of a potential cause of action should have been made is an objective, rather than a subjective, question. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 396, 593 S.E.2d 183 (Ct. App. 2004). The degree of knowledge necessary to start the clock ticking is merely that of a “potential claim” as distinguished from a “full-blown theory of recovery.” Republic, 332 S.C. at 208, 503 S.E.2d at 208. The failure of the injured party to comprehend the full extent of damages is immaterial to determining when the limitations clock begins to run. Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998).

The Court’s and Plaintiffs’ approach to the statute of limitations at trial directly contradicts the holding of Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). In that case, Wiggins was injured in an automobile accident, but did not commence her lawsuit until 3 years and 4 days after the accident. She argued that the statute of limitations did not begin to run until she was “actually able to investigate her case, discover a cause of action existed, and determine who or what caused her injury.” Id. at 128, 442 S.E.2d at 170.

The justices rejected this argument. The court stated:

[T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer:

The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Wiggins, 314 S.C. at 128, 442 S.E.2d at 170 (quoting Tollison v. B & J Machinery Co., Inc., 812 F.Supp. 618, 620 (D.S.C.1993)). In this case, Plaintiffs knew of their injury – water leaking into their units—and even the potential cause – water leaking through or around the windows, absolutely no later than December 18, 2010, more than 3 years prior to the commencement of this lawsuit. The Court should grant judgment in favor of BFS on Plaintiffs’ claim for strict liability.

2. BFS was not estopped to assert the statute of limitations.

The Court also erred in submitting the issue of whether BFS was equitably estopped to assert the statute of limitations to the jury. To establish estoppel, a plaintiff must demonstrate that the party to be estopped created mischief – in this case the failure to assert a claim for allegedly leaky windows within the statute of limitations-- as a result of “one’s own fault” that caused the plaintiff prejudice. Janasik v. Fairway Oaks Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Plaintiffs presented no evidence that BFS made any representation to them and no evidence that BFS appointed any other party or held any other party out as its agent for addressing issues with the windows. See Orphan Aid Society v. Jenkins, 294 S.C. 106, 362 S.E.2d 885 (Ct. App. 1987) (holding that party asserting agency must “prove the existence of the agency, and the agency must be clearly established by the facts,” and that “one who has bought the Brooklyn Bridge cannot overcome the title of the true owner, no matter how persuasive the salesman may have been”).

C. Plaintiffs' claims of strict liability and breach of warranty fail for failure to submit proof of defect as required by Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010).

Plaintiffs' claims of strict product liability and breach of warranty contain a common element of proof; both require plaintiff to demonstrate that the product was in a defective condition. Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). Plaintiffs presented inadequate expert testimony or other record evidence to establish that BFS delivered windows – its only activity with respect to the project— which contained a manufacturing or design defect at the time of their delivery. At best, Plaintiffs' evidence showed that the windows ordered and shipped by BFS (it did not manufacture, design, install, or maintain the windows) leaked years after they had been installed.

Whether proceeding on a theory of manufacturing or design defect Plaintiffs failed to offer evidence of the particular defect, whether in manufacturer or design, that caused the window to leak. As to design defect in particular, Plaintiffs produced no evidence of any feasible alternative design for the windows, as required by South Carolina law, that would have stopped the claimed leakage. Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). Because Plaintiff offered no evidence of and failed to identify any particular manufacturing or design defect in the windows as delivered by BFS, judgment should be entered in favor of BFS on both the strict liability and breach of warranty claims.

Further, the Court also erred in submitting the matter to the jury because the very testing used to established the windows leaked was improper. The testing

protocol used by Plaintiffs' expert to test the windows for leakage specifically referenced AAMA standard 511 as the appropriate testing standards for windows that has been installed for more than six months. Plaintiffs' expert did not utilize this standard. Thus, in addition to there being no evidence that the windows contained a specific manufacturing or design defect, there was no competent evidence demonstrating that the windows leaked under the types of conditions existing in Mt. Pleasant as to weather patterns and the way in which the windows were installed by others.

II. Alternatively, BFS is entitled to a new trial absolute or nisi remittitur.

A. A grant of a new trial pursuant to the thirteenth juror doctrine is warranted because the evidence does not justify the verdict entered by the jury.

The jury rendered a verdict against BFS that has no support in the evidence admitted at trial for two reasons. First, the jury verdict included repair amounts based upon alleged damages to non-party unit owners despite the fact that no class had ever been certified in this action. Second, the jury awarded damages against BFS that included other aspects of the project in which BFS had no involvement or for repair to aspects of the project for damages unrelated to the windows. Either ground warrants application of the thirteenth juror doctrine and the grant of a new trial.

While Plaintiff set forth class allegations in its pleadings, this Court never certified a class of unit owners. As a result, this matter proceeded to the jury on the claims of only two named unit owners Marvin T. Meek and Frances E. Hill and the HOA. According to the Master Deed of the One Belle Hall regime, the windows are included in the individual

units. See Pl. Ex. 69, p. 5. Consequently, the two named individual Plaintiffs and the HOA could only recover for damages resulting from windows in units controlled by them and not the entirety of the project and the HOA could only recover for damage to common elements of the property proximately caused by the alleged leaks in the windows. Damages could be no more than necessary to repair or replace the specific windows in the units of the two named plaintiffs and a common space controlled by the HOA and consequential damages to common elements controlled by the HOA caused by window leakage.

Despite this limitation, the jury returned a verdict that included damages for repair and replacement damages to non-party unit owners for all windows in all units. The jury returned a verdict of \$2,163,493.55. This verdict exactly mirrored the damage estimate of \$2,163,493.55 contained in Trial Exhibit 56 (Def. Exhibit 325(f)) that included damage estimates for all units in One Belle Hall, not just those units owned by the two named plaintiffs or the HOA. Further, the itemization of damages in the exhibit contained damage repair estimates that were causally unrelated to any alleged leakage of the windows. The exhibit only estimated damage related to the windows of \$12,325.00. See Trial Exhibit 56 (Def. Exhibit 325(f)) at p. 2.

The thirteenth juror doctrine "entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (quoting Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). As the thirteenth juror, the trial judge hangs the

jury by refusing to agree with the jury's unanimous verdict and casting his or her vote against it, resulting in a verdict which is no longer unanimous. Id.

The court may grant a new trial, sitting as the thirteenth juror, when it is convinced that a new trial is necessary on the basis of the facts. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). Under the doctrine, a new trial may be granted where the court merely finds that "the verdict is unsupported by the evidence," that "the verdict is inconsistent and reflects the jury's confusion," or that "justice has not prevailed." Id. at 404, 477 S.E.2d at 722-23; see also Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 552 593 S.E.2d 504, 508 (Ct. App. 2004) (granting new trial where "the evidence does not justify the verdict"); Norton, 350 S.C. at 480, 567 S.E.2d at 855 (granting new trial when court "disapprov[es] of the verdict on factual grounds"); McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 631, 578 S.E.2d 746, 747 (Ct. App. 2003) (characterizing use of doctrine as "granting a new trial upon the facts").

The Court's discretion in granting or denying a new trial under the thirteenth juror doctrine is "'founded upon the facts; the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them.'" Vinson, 324 S.C. at 404, 477 S.E.2d at 723 (quoting Fallon v. Rucks, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950)). Consequently, the Court is entitled to "weigh the evidence and rely on his or her view of the circumstances." Sorin Equip. Co. v. The Firm, Inc., 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App. 1996).

Importantly, this Court need not provide any reasons for its exercise of this thirteenth juror power aside from a finding that the Court disapproves and rejects the verdict based on the facts and evidence. Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007). Further, this Court's exercise of its thirteenth juror power will not be disturbed on appeal in the absence of a misuse of the power. Trivelas v. South Carolina Dept. of Transp., 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004) (holding that a circuit court's order granting a new trial upon the facts will not be disturbed unless its decision is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law).

As set forth above and in the grounds asserted for judgment as a matter of law, the jury's verdict is unsupported by the evidence. The verdict should be set aside with a new trial ordered. See, e.g., Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990) (upholding the grant of the exercise of the trial court's thirteenth juror authority because the verdict was not in accordance with the facts, was unsupported by the evidence and/or was against the manifest weight of the evidence).

B. This Court should grant a new trial absolute because the jury verdict is not supported by the evidence admitted at trial and the jury was erroneously charged.

A trial judge is required to grant a new trial absolute when the amount of the verdict is "so grossly . . . excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000); Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App.

1996); Duncan v. Hampton County School Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449, 455 (Ct. App. 1990)(“The trial court must grant a new trial absolute if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive.”). Importantly, it is an abuse of discretion not to grant a new trial absolute when the verdict is “shockingly disproportionate” to the evidence present at trial. Sullivan v. Porter, 317 S.C. 462, 467, 454 S.E.2d 907, 912 (Ct. App. 1995).

As set forth above, the verdict in this case resulted from caprice, passion, prejudice, partiality, corruption, or other improper motive rather than the evidence at trial.

First, the jury returned a verdict based on repair and replacement damages for all unit owners at One Belle Halle despite the fact that no class was certified by this Court. The jury disregarded this fact and returned a verdict that included damages for repair and replacement damages to non-party unit owners for all windows in all units. Thus, the verdict resulted from motives other than the evidence of damages to the two named Plaintiffs’ units. It is this Court’s duty to set aside the verdict absolutely.

Second, this Court should grant a new trial because Plaintiffs presented evidence to the jury 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. Thus, the jury's verdict was the product of passion, prejudice or bias rather than competent evidence.

A new trial is also required where the charges to the jury are incorrect and mislead the jury in its fact-finding role. Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 427-28 (2005).

First, the Court failed to give the required charge that BFS was entitled to notice as a condition precedent to any warranty claim as required by South Carolina law. See Brooks v. GAF Materials Corp., 41 F.Supp.3d 474, 482 (D.S.C. 2014)(listing elements of a breach of implied warranty claim); S.C. Code Ann. §§ 36-2-602, 36-2-607(3)(a), & 36-2-714(1) (requiring notice to the seller of breach of warranty). The failure to give a notice charge to the jury was error and allowed the jury to consider that no proof of notice was required to sustain the claim.

The Court also improperly charged the jury on the statute of limitations. The Court charged the jury 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." This instruction was an improper charge upon the facts of the case. S.C. Const. art. V, § 21. The charge expressly states to the jury the Court's opinion in the matter that it should begin deliberations upon the premise that there are most likely multiple reasonable conclusions they could be reached on the fact of when the Plaintiffs knew or should have known that the windows leaked and were causing damage rather than simply charging the law as to the trigger for the statute of limitations. Cf. State v. Mahaffey, 125 S.C. 313, 118 S.E. 613 (1923) (a court "should carefully refrain from and avoid expressing any opinion that he may have formed from the

facts as to the force, weight, and effect, leaving it to the jury to draw their own conclusions, and not impress upon them any impressions that the testimony may have made in the mind of the judge"). It was the jury's duty to examine the evidence presented to decide what inferences, and how many, might be drawn as to Plaintiffs' knowledge of leaking windows.

The undisputed testimony at trial was that the Plaintiff HOA and homeowners actually knew – not just objectively should have known—that the windows were leaking as early as December 18, 2010, more than three years prior to the commencement of the lawsuit and informed the developer of that fact. See December 18, 2010 email, marked as Exhibit 10 to Meek's deposition; Meek Deposition at 217:4-21, 225:2-7; 286:13-25, and 318:13-320:2. This was all that was necessary to trigger the running of the statutes of limitations. Wiggins, 314 S.C. at 128, 442 S.E.2d at 170. Plaintiffs then had three years to figure out the particulars of that claim and bring suit.

In light of the foregoing, the actual damages verdict was improper or grossly excessive. Hence, a new trial absolute must be ordered.

IV. The Court should grant remittitur because the jury rendered an excessive verdict when compared to the evidence of window repair and replacement adduced at trial.

Failing any of the relief requested above, this Court should grant new trial nisi remittitur because the damages awarded by the jury are clearly excessive compared to the evidence presented at trial. BFS did nothing more than take an order for windows and communicate it to the manufacturer, who then shipped the windows directly to the construction site. BFS had no role in manufacturing or installing the windows. Despite

this limited role, the jury awarded damages against BFS that included other aspects of the project in which BFS had no involvement.

This Court “may grant a new trial nisi remittitur when it finds the verdict is merely inadequate or excessive.” Howard v Roberson, 376 S.C. 143, 654 S.E. 2d 877, 883 (2007). “The consideration of a motion for a new trial nisi remittitur requires the court to consider the adequacy of the verdict in light of the evidence presented.” Waring v. Johnson, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000).

“The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive.” See, e.g., Rush v. Blanchard, 310 S.C. 372, 381, 426 S.E.2d 802, 806 (1993) (affirming trial court’s remittitur); RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E. 2d 438, 442 (Ct. App. 2009) (“[T]he circuit court . . . has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive”); Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 837, 529 S.E.2d 758, 762 (Ct. App. 2000) (affirming trial court’s granting of motion for remittitur on grounds that amount awarded by jury was “merely excessive”).

The jury based its verdict on one exhibit from trial—Trial Exhibit 56 (Def. Exhibit 325(f))—as evident from the exact match between this repair estimate and the verdict, \$2,163,493.55. The exhibit contained damage repair estimates that were, as a matter of law, causally unrelated to any alleged leakage of the windows and provided estimates for those unrelated repairs. For instance, the exhibit includes estimates for repairing garage roofs, replacing toilets and vanities, doing landscaping around outside HVAC units, and removing kitchen tile.

Further, the estimates in Exhibit 56, and thus the verdict, included repair amounts based upon alleged damages to non-party unit owners. While Plaintiff set forth class allegations in its pleadings, this Court never certified a class of unit owners. As a result, this matter proceeded to the jury on the claims of only the named unit owners, Marvin T. Meek and Frances E. Hill and the HOA. Because the windows are, by the Master Deed for the regime, deemed to be part of the individual units, Plaintiffs could only recover repair costs associated with the windows in the Meek and Hill units and in any area (such as an office or other common area) held by the HOA.

The jury could not award damages for the windows of units of other non-party unit owners or damages to the interior of their units. The jury could not award damages against BFS that were not causally related to the alleged window leakage. The jury improperly did so, however, and awarded damages for all windows in all units and for repairs to property with absolutely no relationship to the windows, such as garage roofs and wiring, missing fire stops in the plumbing chases, and regrading of the landscape. See Exhibit 56. Remittitur is necessary to reduce the excessive and incorrect jury verdict. Because the jury relied on Exhibit 56 to set its verdict, the verdict should be remitted to no more than specified in that exhibit for window repairs. Even if one assumes (contrary to reason) that the jury did not simply take Exhibit 56 and make it its verdict, the jury's verdict also has no reasonable, discernable relationship to Plaintiffs' expert's valuation of damages related to replacement of the windows and repair of resulting damage allowable given the named parties and the standing of those parties to claim damages under the regime documents.

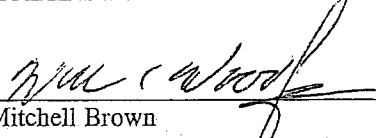
Therefore, this Court should grant remittitur and reduce the verdict to no more than \$12,325.00, plus a proportionate share of the general requirements, permits, overhead, profit, contingency and similar charges set forth in the exhibit 56.

Conclusion

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,

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November 17, 2016

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

One Bell Hall Property Owners) Civil Action No. 2012-CP-10-07594
Association Inc. and Marvin T. Meek)
and Frances E. Hill, individually,)
on behalf of all others similarly)
situated,)

Plaintiffs,)

vs.)

Builders FirstSource Southeast Group)
LLC, et al.,)

Defendant.)

Memorandum in Support of
Defendant's Motion to Compel
Production of Settlement Agreements
and Motion for Setoff

2016 NOV 21 PM 12:30
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendant Builders FirstSource Southeast Group LLC ("BFS") submits this memorandum in support of its Motion to Compel and Determination for Setoff. As set forth in the Motion and below, this Court should grant the motion and setoff the amounts received by Plaintiffs from settling co-defendants from the verdict rendered against BFS.

Factual Background

In the Third Amended Complaint, Plaintiffs sought recovery on a joint and several basis for the same injury against BFS and other specified co-defendants under strict liability and breach of express and implied warranty causes of action. On 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 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.¹ Plaintiffs’ set forth the same injury against all defendants—“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 sought from all defendants, jointly and severally. See Third Amended Complaint ¶ 118.

Prior to trial, Plaintiffs settled the strict product liability and breach of warranty causes of action with each co-defendant. The amount of the settlement with each co-defendant is

¹ Plaintiffs’ asserted their breach of warranty claim against BASF, TAMKO, ESP, Trammell Crow Residential Company, Trammell Crow Residential Carolina, TCR Construction, TCR Development, TCR Carolina Properties Inc., Belle Hall Direct 101, LP, TCR RLD Condominiums, Inc., TCR SE Construction, Inc., TCR SE Construction II, Inc., TCR Southeast, Inc., Tauer Consulting Company, Inc., Halter Properties, LLC, Halter Realty Group, LLC, Cline Design Associates, P.A, Gary D. Cline, GCI Consultants, LLC f/k/a Glazing Consultants, Inc., Stewart Engineering, Inc., ABG Caulking & Waterproofing of Morristown, Inc., Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc., Budget Mechanical Plumbing, Inc., Century Fire Protection, LLC, Coastal Lumber and Framing, LLC, Advanced Building Products & Services, LLC, Dobson Brothers Exterminating Co., First Exterior, LLC, Flooring Services, Inc., General Heating & Air Conditioning Company of Greenville, Inc., Jimmy Warner, Warner Heating & Air, GWC Roofing, Inc., Southcoast Exteriors, Inc., IES Residential Inc. f/k/a Houston Stafford Electrical Contractors, LP, J. Correa Electrical Company, LLC, KMAC of the Carolinas, Inc., P&P Metal Sales Co., Inc., Pleasant Places, Inc., RS General Contracting, LLC f/k/a RS Custom Homes, LLC, Southern Specialties, Inc., Structural Contractors South, Inc., Superior Construction Services, Inc., VNS Corporation, individually, and d/b/a Wholesale Building Products, Billy Gray d/b/a United Builders, LLC, What Don’t We Do.

unknown despite repeated requests that Plaintiffs disclose the amount of each settlement and the filing of a pending motion to compel production of the settlement agreements. BFS understands the settlement amounts taken together far exceed the judgment of \$2,163,000.00 rendered by the jury against BFS on Plaintiffs' strict liability and breach of express and implied warranty causes of action at trial.

Legal Argument

BFS is entitled to a setoff as a matter of law of the amounts received by Plaintiffs from each of the settling co-defendants. Set-off is required by statute and by common law equitable principles.

I. S.C. Code Ann. §15-38-50 requires the Court to apply the settlements of co-defendants as a set-off against the verdict against BFS.

Section 15-38-50 requires setoff when a plaintiff settles with another tortfeasor in the action. It states:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Id. (emphasis added). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." Smith v. Widener, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012) (applying S.C. Code Ann. § 15-38-

50(1) (2005)). Therefore, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. Widener, 397 S.C. at 471-72, 724 S.E.2d at 190; Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998).

When the settlement is for the same claimed injury, as is the case in this matter, the non-settling defendant's right to a setoff arises by operation of law. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999). Under this circumstance, "[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off." Widener, 397 S.C. at 472, 724 S.E.2d at 190; Oliver, 335 S.C. at 113, 515 S.E.2d at 272; see also Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (holding that Section 15-38-50, which discharges tortfeasor to whom release is given from all liability for contribution to any other tortfeasor, 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).

II. Set-off is required as a matter of equity to the extent it is not mandated by S.C. Code Ann. § 15-38-50.

Even if Section 15-38-50 did not require setoff, this Court should still grant the motion under its equitable power. A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action. Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000). "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." Id. at 313, 536 S.E.2d at 425. Allowing this credit

prevents an injured person from obtaining a double recovery for the damage he sustained, for it is "almost universally held that there can be only one satisfaction for an injury or wrong."

Rutland v. S.C. Dept. of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

III. Both the statutory requirement and common law equitable principles are designed to prevent double recovery by the Plaintiff for the same injury or wrong.

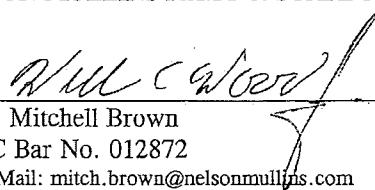
"[T]here can be only one satisfaction for an injury or wrong." Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000); (internal quotation marks omitted); Collins Music Co., Inc. v. Smith, 332 S.C. 145, 148, 503 S.E.2d 481, 482 (Ct. App. 1998) (denying "double recovery (once from each defendant) for actual damages which are coextensive"); Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990) (per curiam) ("It is a fundamental rule of law in this state that there can be no double recovery for a single wrong."). "[T]he reason for allowing such a credit is to prevent an injured person from a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975); see also Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 304-05, 504 S.E.2d 347, 355 (Ct. App. 1998) ("A well-settled general rule is that partial compensation paid by one tort-feasor may be shown by another tort-feasor in mitigation or reduction of damages, for the reason that a party can have but one satisfaction of his damages.") (quoting 25 C.J.S. Damages § 98(2) (1966) (emphasis added)).

Conclusion

Plaintiff will obtain an unlawful and inequitable double recovery unless this Court grants the setoff as required by statute and the common law. The Court should compel Plaintiffs to produce the settlement agreements as to every co-defendant and set-off the sum of such settlements against the verdict rendered against BFS.

Respectfully submitted,

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November 17, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-7594
	)	
ONE BELLE HALL PROPERTY OWNERS	)	
ASSOCIATION, INC. and MARVIN T.	)	
MEEK and FRANCIS E. HILL, individually,	)	
and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' SUPPLEMENTAL
	)	MEMORANDUM OF LAW IN
vs.	)	OPPOSITION TO BUILDERS
	)	FIRSTSOURCE-SOUTHEAST
Builders FirstSource – Southeast Group, LLC;	)	GROUP, LLC'S MOTION TO
	)	COMPEL AND MOTION FOR SET-
Defendant.	)	OFF

Come Now Plaintiffs, and file this supplemental memorandum in opposition to Defendant Builders FirstSource-Southeast Group, LLC's (hereinafter "BFS") motions, highlighting, simplifying, and slightly supplementing Plaintiffs' previously briefed positions to the Court:

1. **Procedurally Improper.** BFS is not entitled to any relief whatsoever, as there is no longer any case pending in this Court. This Court issued a Form 4 Order on September 21, 2016, *nunc pro tunc*, to enroll the jury verdict. The Form 4 Order clearly indicates, "This order ends the case." In that regard, the finality of this Form 4 Order was even clearer than that which was deemed to end the case in *Cheap-O's Truck Stop v. Cloyd*, where the Court of Appeals held a diagonal line penned through the area for additional writing indicated the no further action was contemplated and the Form 4 Order was a Final Order ending the case. 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002). Here, this Court gave BFS an express statement that the case was ended.

- a. While BFS trial counsel did file a Motion to Compel discovery before the Form 4 Order was entered, contrary to customary protocol (*Cf.* SCRCP 50, 52, 59)¹, the Trial Judge is not shown as copied on this Motion and may not have known that it existed at the time the Form 4 Order was executed.
- b. Post-trial counsel made an appearance in this matter on September 12, 2016.
- c. The Form 4 Order was transmitted by First Circuit chambers personnel to the Ninth Circuit Clerk of Court for enrollment on September 20, 2016.¹ Notice of entry of the Form 4 Order was served by the Clerk of Court on all Counsel of Record on September 27, 2016.
- d. To maintain Circuit Court jurisdiction of this case, BFS needed to file a Rule 59 motion to alter or amend the Form 4 Order which had already ended the case. This never occurred. The appeal time has run. This case is over. *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.”).
- e. The filing of the JNOV motion on September 12, 2016 by post-trial counsel, as a successive JNOV motion, is a nullity in the eyes of the law² and did not suspend the time for appeal.
- f. Even if the second JNOV motion was not a nullity, the failure to move to alter or amend the Form 4 Order is fatal to the September 8 and 12, 2016 motions.
- g. To the extent the foregoing is not dispositive:

2. Set-off Should Also Be Denied on the Merits. The Court need not reach the issue of whether the Defendant may be entitled to a set-off on the strict liability verdict for the

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

² *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.).

many reasons listed below and described sequentially in more detail in each of the following sections:

- a. Similar to the two-issue rule, because Breach of Warranty cannot be set-off and the jury rendered a general verdict, the need to set-off strict liability is mooted.
- b. By consent, the issue of window related damages was tried to the jury with complete disclosure as to gross damages, other issues, and other potential at fault parties; further, BFS disclosed to the jury that other defendants had paid Plaintiff.
- c. At best, BFS can only claim a partial damage overlap; which takes this issue out of statutory set-off and into equitable set-off, which was not pled by Defendant in its September 7, 2016 Motion. Even if the lack of equitable set-off pleading is overlooked by the Court, equitable set-off only applies to the same causes of action; the only other recovery potentially related to strict liability in tort and window damage were from the window manufacturer; and BFS already argued to the jury there should be a damage reduction because of the actions of these other parties and is not entitled to a second bite at the apple.ⁱⁱ
- d. Additionally, because BFS failed to request special interrogatories, and consented to the dismissal of the jury, BFS can't meet its burden to show what portion of the verdict overlaps with any other recovery by the Plaintiffs.

3. Warranty Not Subject to Set-off. The jury rendered a general verdict containing the additional cause of action for breach of warranty (both express and implied). Breach of warranty sounds in contract,³ and is not subject to the joint tortfeasor set-off statute (S.C. Code Ann. § 15-38-50). As there was a general verdict, there was no motion for an election of remedies; a set-off on, e.g., strict liability, would not affect the total amount of the verdict.

- a. Similar to the two-issue rule, when there is a general verdict on two or more causes of action and set-off 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

³ *Mauldin v. Milford*, 127 S.C. 508, 522, 121 S.E. 547, 552 (1924) (“[A]n action for breach of warranty sounds in contract.”)

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).

- b. The trial court in *Atkinson v. Orkin Exterminating Co.*, held the defendant was not entitled to set-off on an action sounding in contract. 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) *aff'd*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding the defendant was not entitled to a set-off because the case involved duties arising out of two independent contracts).
- c. Courts in other jurisdictions have found statutes that permit set-off between joint tortfeasors are not applicable in actions that sound in contract. *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 set-off statute does not apply to contract based actions); *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, No. 03-4165-JAR, 2008 WL 1924948, at *5 (D. Kan. Apr. 28, 2008) (the one satisfaction (set-off) rule does not apply to claims brought in contract).
- d. As briefed previously, BFS contractually waived its right to set-off. *Cf. Applied Co. v. United States*, 144 F.3d 1470, 1476 (Fed. Cir. 1998) (a party may contractually waive its right to both equitable and statutory set-off).

Breach of warranty sounds in contract and the joint tortfeasor set-off statute is not applicable. Further, the warranty that was breached was exclusive to BFS and no other product manufacturer or subcontractor can be shown to have made a payment on behalf of BFS's warranty obligations. Under no circumstances is BFS entitled to set-off on Breach of Warranty.

4. **Window Only Damage was Tried by Consent.** Plaintiffs tried a window damage only case to the jury. BFS complemented this by informing the jury that Plaintiffs had reach agreements with other parties and attempting to shift liability to others. In the end, the jury was asked to award the Plaintiffs the damages caused by BFS.

- a. Plaintiffs requested damages related solely to the windows from the jury. *Cf. McCurry v. Keith*, 352 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) (set-off deemed tried by consent).

5. Smith v. Widener: Partial Overlap Rule. There is no set-off 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).

- a. For the reasons enunciated above and below, an allocation between causes of action is not necessary, and is, in fact, impossible in this case: e.g., the jury’s verdict awarding damages to Plaintiffs for breach of warranty is not subject to the joint tortfeasors set-off statute, BFS failed to request special interrogatories so as to show what portion of the verdict overlaps with any other recovery by the Plaintiffs, and a retroactive allocation of the jury’s verdict is impossible and would require a new trial.

6. BFS Can’t Meet Its Burden of Proof Without Special Verdict Form. To prove entitlement to set-off BFS should have requested a special verdict form. It did not, and now, BFS cannot meet its burden of proof.

- a. BFS bears the burden of proving it was entitled to set-off on the strict liability cause of action. *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 set-off 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); *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 verdict and caused a failure of evidence to justify set-off).

- b. To meet its burden, BFS would have to show that Plaintiffs were compensated by a settling party for the same injury. The general verdict form and damages instructions, which BFS did not object to, did not ask the jury to specify the injury for which it was compensating Plaintiffs. The Court cannot now speculate as to the jury's determination. *Armstrong v. Collins*, 366 S.C. 204, 227, 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).
- c. It is not possible for BFS to try to backfill the void left by a lack of jury information by use of settlement agreements. Not only would this proof be inadequate, it is impossible to obtain with any reliability or efficiency. For example, a very large percentage of Plaintiffs' recovery was confidentially paid by a single insurance carrier for dozens of parties insured under the general contractor's project "wrap" policy, including the stucco installer, without any allocation as to the party, the cause of action, or the damages. This results in hundreds of variables in any attempted allocation of these settlement funds by the Court.

7. Other Policy Considerations for Equitable Set-off. It's axiomatic that once outside of the tortfeasor set-off statute because of, e.g., different causes of action, that any set-off is in the Court's discretion. There is no double recovery; and the Court should not use its discretion to reward BFS for its conduct.

- a. There is no proof of double recovery, either on window related damages, or the project as a whole. Even without set-off, Plaintiffs will be \$2.5m shy of their repair estimate, and will not be compensated for the loss of occupancy during the repairs.
- b. The public policy of preventing a windfall to a tortfeasor outweighs the public policy of preventing a windfall to a victim. *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 v. Gooden*, 350 S.C.

409, 566 S.E.2d 199, (Ct. App. 2002) (Public policy is to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor).

- c. 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).

8. Other Grounds Contained in Plaintiffs' November 16, 2016 Memorandums. Other

grounds in opposition to the second JNOV motion (and Motion to Compel) are briefed in Plaintiffs' Memorandums filed November 16, 2016.

- a. Defendant's continued insistence that BFS's opposition to Plaintiffs' directed verdict ("DV") motion constituted a renewed DV motion by BFS is grasping at straws, especially as
 - i. there is no BFS renewed DV motion in the transcript;
 - ii. there is no ruling on a renewed BFS DV motion in the transcript; and,
 - iii. the Court expressly states that BFS is the non-moving party in ruling on Plaintiffs' DV motion (page 639).
- b. Just as bad is Defendant's November 18, 2016 first orally asserted position that its second JNOV motion was really a motion to reconsider.
- c. These continued positions further compound the previously baseless positions by BFS, the majority of which were only withdrawn as a result of a formal consultation by Plaintiffs. The majority of BFS's remaining successive JNOV grounds were not raised in its initial DV motion and cannot be raised now.
- d. One of BFS's only two JNOV grounds actually raised at close of Plaintiffs' case, *sufficiency of evidence as to product defect*, is belied singularly and collectively by the un-objected to testimony of Dr. Whitlock and Mr. VanDommelen, and the un-objected to and stipulated exhibits, and further buttressed by the testimony of other witnesses, including defense expert Mr. Watkins.
- e. The only other JNOV ground timely raised by BFS, *unreasonably dangerous*, was proven by the testimony of many witnessesⁱⁱⁱ and essentially conceded by current and former BFS employees.

9. Raymond Paid on the Negligence Cause of Action; Therefore, Set-off is

Inappropriate. While its Plaintiffs' belief that there cannot possibly be any overlap

between any other party's express warranty and that of BFS, ignoring the BFS contractual obligation, the only possible overlap that could be asserted by BFS would be the payment of \$215,000.00 by Raymond, the window manufacturer. However, as set-off requires the same cause of action, this attempt fails too. The sums paid by Raymond were actually paid by its insurance carriers.^{iv} Commercial general liability ("CGL") policies cover negligence, not express warranty. There is no way for BFS to offer evidence that this payment by Raymond was made upon anything other than the negligence cause of action; again, BFS cannot meet its burden.

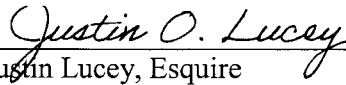
CONCLUSION

After five months, what the Court is left with is a total absence of proof of entitlement to set-off by BFS. The only information contained in the settlement agreements and releases is the amount of the individual settlements; this has no bearing on the initial entitlement to set-off (the gross amount would, but that was disclosed in open Court at the commencement of trial). BFS has enjoyed discovery in this case for years, and it has yet to mine the record for any evidence supporting any entitlement to set-off. The best evidence, an answer from the jury, was not sought by BFS, despite invitation from the Court before the jury was excused. BFS has no one but itself to blame for its current predicament;⁴ and its motions should be overruled.

[signature block on following page]

⁴ BFS's "predicament", caused by their pre-litigation conduct, would be far worse had their trial counsel not done such an excellent job of defeating Plaintiffs' negligence claim (and attendant punitive damage claim) and getting the jury to award less than half of the actual damages (and little or no loss of use damages) sought by Plaintiffs.

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April 19, 2017
Mount Pleasant, South Carolina

ⁱ It's not apparent from the face of the Order as to when it was signed as it was dated *nunc pro tunc* to Sept. 1, 2016 (the date of the verdict).

ⁱⁱ There is simply no evidence to relate any of the window damage to the written roof warranty issued by the only other manufacturer/supplier defendant in the case, Tamko. There is also no evidence presented by BFS linking BASF to water damage. Even if there was, these parties collectively paid approximately five percent of the verdict.

ⁱⁱⁱ Several One Belle Hall homeowners testified to the level of damage and termite infestations caused by the defective windows.

^{iv} Check copies will be brought to the hearing.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

One Bell Hall Property Owners) Civil Action No. 2012-CP-10-07594
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.)

Supplemental memorandum with
remaining grounds for consideration
in BFS's post-trial motion

FILED
2017 APR 19 PM 1:14
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Builders FirstSource Southeast Group LLC ("BFS") submits this supplemental memorandum in support of its post-trial motion to address the remaining grounds in the motion. Defendant Builders FirstSource Southeast Group LLC ("BFS") agreed to withdraw several grounds set forth in its post-trial motion filed September 13, 2016.¹ As a result, BFS submits this supplemental memorandum that sets forth the remaining arguments from the initial post-trial motion for ease of reference. BFS kept the initial numbering from the initial post-trial motion in this supplemental filing because that tracks how the parties and Court have been communicating about the matter.

The remaining issues in BFS's post-trial motion are as follows:

¹ BFS withdraws the items numbered 1, 2, 3, 4, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 from the post-trial motion.

A. Review of Denial of BFS's Motion for Judgment Notwithstanding the

Verdict:

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).

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.

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.

B. BFS withdraws the New Trial, New Trial Absolute, Thirteenth Juror, and New Trial Remittitur arguments found on pages 6-12 of the Motion in full.

In addition to the above, reconsideration should issue and JNOV should be granted because this Court improperly denied BFS's directed verdict motion and submitted Plaintiffs' claims to the jury as set forth in detail below:

A motion for JNOV should be granted only if no reasonable jury could have reached the challenged verdict. Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial judge may reverse when a review of the record discloses no evidence which reasonably supports the factual finding necessary to sustain the verdict. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993). While the Court is concerned with the existence of evidence, not its weight, Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003), and may not decide credibility issues or to resolve conflicts in the testimony or the evidence, Id. at 320, 585 S.E.2d at 274, JNOV is warranted when there is no evidence to support the ruling or where the ruling is

controlled by an error of law. Hinkle v. National Cas. Ins. Co., 354 S.C. 92, 579 S.E.2d 616 (2003).

Plaintiffs' claims of strict liability and breach of warranty fail for failure to submit proof of defect as required by Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). At trial, BFS moved for directed verdict because Plaintiffs' failed to carry their burden of proof as to defect. Plaintiff did not carry its burden because, inter alia, Plaintiffs failed to introduce any evidence of feasible alternative design for the windows, as required by South Carolina law, that would have stopped the claimed leakage. Thus, this Court should reconsider the denial of JNOV and enter judgment in favor of BFS.

Plaintiffs' claims of strict product liability and breach of warranty contain a common element of proof; both require plaintiff to demonstrate that the product was in a defective condition. Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). Plaintiffs presented inadequate expert testimony or other record evidence to establish that BFS delivered windows – its only activity with respect to the project— which contained a manufacturing or design defect at the time of their delivery. At best, Plaintiffs' evidence showed that the windows ordered and shipped by BFS (it did not manufacture, design, install, or maintain the windows) leaked years after they had been installed.

Whether proceeding on a theory of manufacturing or design defect Plaintiffs failed to offer evidence of the particular defect, whether in manufacturer or design, that caused the window to leak. As to design defect in particular, Plaintiffs produced

no evidence of any feasible alternative design for the windows, as required by South Carolina law, that would have stopped the claimed leakage. Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). Because Plaintiff offered no evidence of and failed to identify any particular manufacturing or design defect in the windows as delivered by BFS, judgment should be entered in favor of BFS on both the strict liability and breach of warranty claims.

Also, the Court also erred in submitting the matter to the jury because the very testing used to establish the windows leaked was improper. The testing protocol used by Plaintiffs' expert to test the windows for leakage specifically referenced AAMA standard 511 as the appropriate testing standards for windows that has been installed for more than six months. Plaintiffs' expert did not utilize this standard. Thus, in addition to there being no evidence that the windows contained a specific manufacturing or design defect, there was no competent evidence demonstrating that the windows leaked under the types of conditions existing in Mt. Pleasant as to weather patterns and the way in which the windows were installed by others.

Moreover, this Court should reconsider the denial of BFS's JNOV motion because Plaintiffs presented evidence to the jury 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. Thus, Plaintiffs failed to submit competent evidence of defect.

Conclusion

Wherefore, BFS requests that the Court reconsider its denial of BFS's JNOV motion and grant judgment in favor of BFS.

Respectfully submitted,

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April 18, 2017

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

One Bell Hall Property Owners) Civil Action No. 2012-CP-10-07594
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.)

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

FILED
CLERK OF COURT
2017 DEC 11 PM 1:56

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.

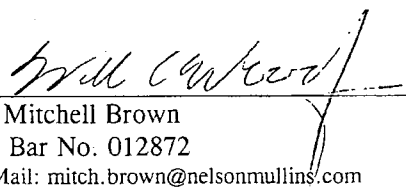
In the last part of the order, the Court recapitulates several of its prior holdings to make the general assertion that BFS's arguments are unpersuasive. The issue of whether set off is allowed as to a claim based on warranty, express or implied, the applicability of set-off to judgments on a verdict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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

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RECEIVED

DEC 10 2018

SC Court of Appeals

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

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

Respondents,

v.

Builders FirstSource-Southeast Group, LLC,

Appellant.

RESPONDENTS' MOTION TO DISMISS APPEAL

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December 5, 2018
Mount Pleasant, South Carolina

RESPONDENTS' MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), Respondents¹ hereby move this Court for an order dismissing this appeal. The grounds for this Motion are as follows:

1. This Court lacks appellate jurisdiction because Appellant² failed to timely serve its Notice of Appeal within 30 days after receiving the final order ending this action;
2. BFS neither moved to reconsider the final order nor appealed the Trial Court's denial of its JNOV Motion; and,
3. As such, any question raised by BFS on appeal is irrelevant because the final order cannot be challenged.

SUMMARY OF ARGUMENT

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

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

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

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

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

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

PERTINENT PROCEDURAL BACKGROUND

An overview of the procedural history of this action³ establishes that BFS’s Notice of Appeal is untimely:

A.) The Trial of the Underlying Case

1. This case was tried before a jury in Charleston County between August 29, 2016 and September 1, 2016.⁴

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

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

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

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

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

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

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

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

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

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

⁵ Plaintiffs' three claims consisted of negligence, breach of warranty and strict liability.

⁶ The portions of the Trial Transcript referenced herein are attached as Exhibit "A".

⁷ The jury found that BFS was not liable in negligence.

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

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

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

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

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

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

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

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

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

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

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

D.) Trial Court’s Final Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ This memorandum was hand delivered at the hearing then filed on November 21, 2016.

⁹ The portions of the November 18, 2016 hearing transcript referenced herein are attached as Exhibit "M".

¹⁰ BFS's post-trial counsel also conceded they had not reviewed (or even requested) the trial transcript. (Hr'g Trans. 34:10-16).

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

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

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

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

F.) The Continued Post-Trial Hearing

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

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

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

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

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

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

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

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

39. Plaintiffs provided the settlement agreements to BFS.

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Judgment Stands Under the Two-Issue Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To be clear, BFS's Second JNOV Motion:

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

South Carolina Courts are clear that successive JNOV Motions such as this are improper.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

JUSTIN O’TOOLE LUCEY, P.A.

By: _____


Justin O’Toole Lucey, Esquire (Bar No. 15438)
Dabny Lynn, Esquire (Bar No. 78703)
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Attorneys for the Respondents

December 5, 2018
Mount Pleasant, South Carolina



Re: OBH - Plaintiffs proposed verdict form

1 message

Davi Dyer <ddyer@kernodelelaw.com>

Thu, Sep 1, 2016 at 8:17 PM

To: Justin Lucey <jlucey@lucey-law.com>

Cc: Kristina Shernoff <kshernoff@lucey-law.com>, dgoodsteinj@sccourts.org, DGOODSTEINLC@sccourts.org, Annette Mixson <amixson@lucey-law.com>

Fine with me

C. Davi Dyer
Kernode Coleman
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Charleston, SC 29414
ddyer@kernodelelaw.com
(843) 795-7800
(843) 795-3032 Fax

On Thu, Sep 1, 2016 at 8:13 PM, Justin Lucey <jlucey@lucey-law.com> wrote:
Judge Goodstein & Davi:

Attached is a proposed second verdict form. Please let me know of any edits. My staff will print several copies.

Justin Lucey

On Thu, Sep 1, 2016 at 2:20 PM, Kristina Shernoff <kshernoff@lucey-law.com> wrote:

Dear Judge Goodstein,

Per Mr. Lucey instructions, please find the attached verdict form with the case caption.

Thank you,

Kristina

Kristina K. Shernoff

JUSTIN O'TOOLE LUCEY, PA

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843-849-8406 (fax)

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Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

**KERNODLE
COLEMAN**
ATTORNEYS AT LAW

C. Davi Dyer, Esquire
ddyer@kernodlelaw.com

September 7, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: *One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all other similarly situated v. Trammel Crow Residential, Builders FirstSource - Southeast Group, LLC et. al.,*
Case No.: 2012-CP-10-7594
KC File No.: 6002-194

Dear Ms. Armstrong:

Enclosed is an original and one copy of a *Notice of Motion and Motion to Compel and Motion for Determination of Setoff*, together with a Motion and Order Information Sheet and our firm check in the amount of \$25.00 in payment of the required fee. Kindly file the original and return a date-stamped copy of the Motion to me in the envelope provided for your convenience.

By copy of this letter, I am serving opposing counsel with a copy of same.

Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

KERNODLE COLEMAN

C. Davi Dyer

CDD/mlj
Enclosures

cc: Via E-Mail only w/encl.
Justin O. Lucey, Esquire / Dabny Lynn, Esquire

kernodlelaw.com



ROA_04671

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 108
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

178



JUSTIN OTOOLE LUCEY
PO BOX 806
MT PLEASANT SC 29465-0806

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Jury Verdict for the Plaintiff

CASE NO: 2012CP1007594

One Belle Hall Property Owners Association Inc , plaintiff, et al VS Trammell Crow Residential ,

This judgment was entered on the 22nd day of September, 2016, and notice mailed first class on Tuesday, September 27, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

OCT 3 2016



NELSON MULLINS

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June 29, 2018

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

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 Counsel,

We enclose herewith and serve upon you by mail a copy of Appellant's Notice of Appeal in the above-referenced matter. Should you have any questions, please feel free to contact us.

Sincerely,

William C. Wood, Jr.

WCWJR:kdm
Enclosures

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.

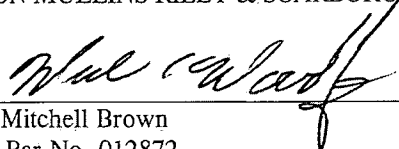
Builders FirstSource-Southeast Group, LLC, ... Defendant/
Appellant.

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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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.

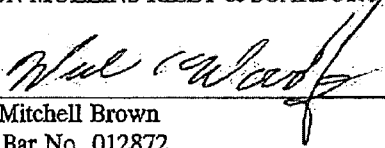
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[Signatures Next Page]

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SC Court of Appeals

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