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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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' FINAL BRIEF

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August 21, 2019
Mount Pleasant, South Carolina

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THE SINGLE ISSUE ON APPEAL

Is BFS entitled to a setoff of the judgment that ended this case in 2016?

SUMMARY OF ARGUMENT

After issuing a warranty assuming all liability for defective products it supplied; after asking the jury to decide what damages it was responsible for considering the other defendants, other injuries and prior settlements it injected into trial; after blaming its former counsel and an incoming storm for errors made during trial; after moving for JNOV following the jury's verdict and failing to move for reconsideration of the denial of this motion; after moving for JNOV again on the same grounds and prosecuting this successive motion for two years based on a directed verdict motion never made and leave of court never requested; after filing a motion to compel settlement agreements that it did not serve on the trial judge; after delaying post-trial hearings for six months because it did not order the trial transcript; and, after waiting two years to appeal the Final Order ending this case, BFS now abandons everything in its Notice of Appeal except a ruling purportedly denying setoff, even though BFS has not actually moved for setoff or articulated an amount it seeks to setoff. Unfortunately for BFS, this appeal is untimely, and regardless, any alleged setoff denial is procedurally and substantively proper. This appeal needs to be promptly denied.

STATEMENT OF THE CASE

This action concerns leaky windows supplied by BFS to the One Belle Hall Condominiums ("One Belle Hall" or "OBH") and the resulting, substantial damage.

A. Introduction and Pre-Trial Matters

OBH is a condominium complex located in Mount Pleasant, South Carolina that consists of four, three-story buildings housing a total of 59 residences. After discovering many deficiencies and severe damage existing throughout all four buildings, the One Belle Hall Property Owners' Association ("Association") filed an initial Complaint on November 19, 2012 asserting distinct claims of negligence, breach of warranty, strict liability, and other causes of action. (R. pp. 48-64).

On December 31, 2013, the Association filed an Amended Complaint to identify certain "John Doe" defendants, including BFS. (R. pp. 65-105). BFS was named in three causes of action: negligence, breach of warranty, and strict liability. *Id.* A few weeks later, BFS filed its Answer to the Amended Complaint. (R. pp. 95-105). BFS's Answer made no mention of setoff. *Id.* Two additional, Amended Complaints were filed and BFS's Answers remained the same. (R. pp. 106-136; 137-147; 148-175; 176-186).

B. The Trial

This case was tried before a jury in Charleston County between August 29, 2016 and September 1, 2016.[1] After the Association rested, BFS moved for a directed verdict on each of the three claims against it, all of which the circuit court denied. (R. pp. 491:15-494:19).

After BFS completed its case, the Association moved for a directed verdict on each of its claims, all of which the circuit court denied. (R. pp. 622:4-635:10). BFS made no motions, failing to renew the directed verdict motions it previously made at the close of the Association's case. (R. p. 635:9-10).

Prior to submitting the case to the jury, the circuit court asked the parties to review its charges as well as the verdict form. (R. p. 636:5-22). BFS's trial counsel "was satisfied" with the jury charges and consented to the final verdict form. (R. pp. 731:1-736:13; 4670).

On September 1, 2016, the jury returned a general verdict for the Association in the amount of $2,163,493 on its breach of warranty and strict liability claims (R. pp. 46-47). The jury found BFS was not liable in negligence. Before excusing the jury, the circuit court asked the parties

[1] At trial, BFS was represented by Davi Dyer who is referred to as BFS's "trial counsel". BFS is now represented by William C. Wood, Jr. and C. Mitchell Brown who are referred to as BFS's "post-trial counsel".

whether there were any matters that needed to be taken up and both parties answered no. (R. pp. 28; 740:16-22)

C. Trial Court's Denial of BFS's JNOV Motion

After the jury was excused, BFS orally made its JNOV Motion. (R. p. 744:2-5); *see also* (R. p. 27); (BFS Brief at 14) (admitting "post-verdict motions were made immediately after the verdict"). The circuit court denied this Motion. (R. p. 744:6-12); *see also* (R. p. 27). BFS did not present any other post-trial motions, did not request leave of court to file post-trial motions, and never moved for reconsideration. (R. p. 27). After these arguments, the circuit court and counsel discussed that setoff was a moot point since the jury found against the Association on its negligence claim. (R. p. 28). BFS does not appeal the denial of this JNOV Motion. (R. pp. 4676-7).

D. BFS's Motion to Compel and Second JNOV Motion

On September 8, 2016, BFS filed a "Notice of Motion and Motion to Compel and Motion for Determination of Setoff" (R. pp. 4492-3) requesting the circuit court to compel the production of certain settlement agreements. (R. p. 4493). Despite the title of the Motion, the substance of the Motion did not request a setoff; rather, BFS informed the circuit court that <u>following</u> the production of the requested documents: "BFS <u>will move</u> to seek a determination [of the] setoff to be taken against the judgment awarded by the jury." *Id.* (emphasis added). This Motion was not served on the trial judge. (R. pp. 28; 4671).

On September 12, 2016, BFS's post-trial counsel filed a "Motion for Judgment, New Trial Absolute, or, in the alternative, for New Trial *Nisi Remittitur*" (R pp. 4494-4506). In this Motion, which does not reference "reconsideration", "alter", or "amend" anywhere, BFS again moved for JNOV. (R. pp. 4494; 4505)

E. Trial Court's Final Order

On September 22, 2016, the circuit court issued a Form 4 Order ("Final Order") entering judgment against BFS in the same amount the jury awarded ($2,163,493) on the Association's breach of warranty and strict liability claims. (R. p. 28); *see also* (R. p. 22). The Form 4 Order is the Final Order – it indicates "This order ends the case." *Id.* On September 27, 2016, the parties received written notice of the Final Order. (R. p. 4539). BFS never filed a motion requesting that the circuit court alter, amend or reconsider this Order. (R. p. 28).

F. The Initial Post-Trial Hearing on BFS's Written Post-Trial Motions

The circuit court's first, post-trial motion hearing occurred on November 18, 2016. (R. p. 28). Prior to the hearing, the Association 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. (R. pp. 4507-43). The Association 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 barred because BFS did not move to reconsider the circuit court's Final Order. (R. pp. 4544-80).[2]

During the hearing, BFS's post-trial counsel argued that the September 12, 2016 Motion was the JNOV Motion; and, it was evident that BFS's post-trial counsel did not understand that BFS's trial counsel already made a JNOV Motion at trial and that this Motion had been denied. *See, e.g.,* (R. pp. 748:9; 778:6-8; 781:8-9) (BFS's post-trial counsel repeatedly describing its

[2] On the day of the hearing, BFS served a Memorandum Supporting its Second JNOV Motion as well as a "Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff" (R. pp. 4581-86; 4587-4608). The "Motion for Setoff" referenced in BFS's Memorandum was never filed. (R. p. 29)

motion as one for "JNOV"). In responding, the Association's counsel argued that BFS's Second JNOV Motion was untimely and improper:

> We shouldn't be starting over from scratch. [The] 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 Final 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. There was no second DV motion. The [first] JNOV motion [was] denied. This [second] JNOV motion is untimely. It doesn't exist in the eyes of [the] law. This motion does not exist. . .

(R. pp. 783:19-784:11).

Association's counsel then provided relevant portions of the trial transcript which showed that: (a) BFS's JNOV Motion was already raised and ruled upon by the circuit 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. (R. pp. 784:13-25; 787:20-792:18). In response, BFS's post-trial counsel requested the circuit court continue the hearing so they could order and review the trial transcript in full. (R. pp. 795:1-799:25).

G. The Continued Post-Trial Hearing

The continued, post-trial motion hearing occurred on April 20, 2017. On April 18, 2017, BFS submitted a Supplemental Memorandum that attempted to characterize its Second JNOV Motion as one for reconsideration of the circuit court's denial of its first JNOV Motion. (R. p. 4621) ("[T]his Court should reconsider the denial of JNOV and enter judgment in favor of BFS."). In this same memorandum, BFS withdrew 20 grounds initially asserted in its Second JNOV Motion as well as its new trial arguments in their entirety. (R. pp. 4618-21).

On April 20, 2017, the Association 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. (R. pp. 4609-17).

At the hearing, BFS's post-trial counsel argued BFS was entitled to the Association's pre-trial settlements and that its Second JNOV Motion was not successive. The Association reiterated: (1) setoff was procedurally impossible; and, (2) BFS's Second JNOV Motion mirrored BFS's first JNOV Motion which was denied, and BFS did not challenge this denial. (R. p. 29).

H. Association Produced Settlement Documents and BFS Failed to Move for Setoff

Following counsels' arguments, the circuit court instructed the Association to produce its pre-trial settlements so there would be an adequate record regardless of the court's eventual ruling. (R. p. 29). The Association provided the settlements to BFS. (R. p. 29). ("On April 20, 2017, the [circuit court] orally ordered [the Association] to produce the [s]ettlement [a]greements. . .[The Association] complied shortly thereafter."). BFS never filed the setoff motion it indicated it would file after receiving these agreements. *Id.* ("Although [BFS] has possessed the settlement agreement for some time, 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"). Six months lapsed, and no evidence of entitlement to setoff or amount thereof was ever proffered by BFS.

I. Denial of BFS's Motion to Compel and Subsequent Appeal

On November 16, 2017, the circuit court issued an Order denying BFS's Motion to Compel. (R. pp. 26-44). On December 11, 2017, BFS filed its third, post-trial motion, a Motion to Reconsider this Denial. (R. pp. 4624-48). On June 27, 2018, the Circuit Court denied BFS's final Motion. (R. p. 45)

On June 29, 2018, BFS served its Notice of Appeal on Plaintiffs. 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 (R. pp. 4673-75). The oral denial of the JNOV motion after the jury was excused has not been appealed.

STATEMENT OF PERTINENT FACTS

A. Introduction

BFS supplied windows to OBH which BFS warranted as "quality" and "free from defect". (R. pp. 1106-09; 1851-2099). However, the windows are neither "quality" nor "free from defect" because they all leak. After considering the evidence presented at trial about the hundreds of leaky, illegal windows supplied by BFS, as well as the significant water intrusion (water leaks through five window intersections most times its rains), severe structural damage (wooden framing members are degraded to the point that they can be penetrated with just a finger), and many termite infestations (termites swarm during family dinners and through interior walls, leaving termite dropping or "frass" trails several feet long in their wake) these windows caused, the jury agreed that the windows were defective, unreasonably dangerous and contrary to what BFS promised, returning a $2,163,493 general verdict against BFS.

BFS now attempts to "setoff" this verdict even though: (1) setoff only applies to joint "tortfeasors" and the jury found that BFS was not liable in tort; (2) BFS obligated itself to pay the entire amount awarded by the jury; (3) BFS admitted that any damages awarded against it are "clearly divisible" from all other damage at OBH; (4) BFS already received the benefit of pre-trial settlements through the Association's reduced damages at trial; (5) BFS allowed the jury to decide the allocation/setoff issue; (6) the jury returned a verdict for millions less than the Association's already self-reduced damages; and, (7) BFS has yet to articulate the "setoff" amount it seeks, let alone the justification therefore.

All grounds for appeal other than setoff have been abandoned by BFS.[3]

B. BFS Claimed it was Not a Joint Tortfeasor, Any Damages Attributable to BFS were Divisible, and the Jury Agreed

Prior to trial, BFS filed a Motion in Limine entitled "Apportionment of Damages" that maintained: (1) BFS was not a joint tortfeasor; and, (2) damages attributable to BFS were clearly divisible. (R. p. 4490)("Should it be found that BFS is liable in this case . . . damages applicable to BFS are clearly divisible from all of damages at the project [and] BFS cannot be held joint and severally liable for any all-encompassing damages awarded to [Association].").[4] The jury agreed BFS was not a "joint tortfeasor" when it found that BFS was not liable in negligence, but was liable in contract and strict liability. The jury also agreed that the damages attributable to BFS were "clearly divisible" and provided BFS a reduction on these damages when it returned a verdict for half of the Association's "window-only" repair estimate.

C. BFS Independently Obligated Itself to Pay the Judgment

Additionally, BFS contractually obligated itself to pay the judgment at no expense to others. BFS agreed to a purchase order and provided an express warranty which stated:

> [BFS] warrants all [windows] to be free from defects in materials, design, and workmanship. . .[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.

(R. pp. 1106-09)(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

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[3] This Court should not even reach the merits because this appeal is procedurally barred. The Association incorporates by reference its Motion to Dismiss filed December 10, 2018.

[4] BFS's Motion in Limine also sought to preclude any reference to "settlement demands, offers or negotiations between the parties." (R. p. 4487). The circuit court granted this part of BFS's Motion; however, as detailed below, BFS's trial counsel made repeated references to settlements and/or negotiations between the parties.

this Subcontractor at no expense to the Contractor, Owner or Owner's Representative.

(R. pp. 1147) (emphasis added). BFS's Area Vice President, Bob Lanier, conceded at trial that he entered these contracts on BFS's behalf and that BFS was "obligated to adhere" to their terms:

Q: And you agree that this addendum and this purchase order once it was signed by both parties in fact became a contract, correct?
A: Yes, sir.
Q: And [BFS] was obligated to adhere to the contract, correct?
A: Yes, sir.

(R. pp. 475:19-25).

D. The Association Reduced its Damages at Trial and Asked for Different Damages at Trial

The Association reduced its damages at trial to account for the total amount received in pre-trial settlements, and separately, asked the jury to award loss of use which is a different injury that falls outside the scope of these settlements.[5]

The Association's repair estimation expert, Gary Moore ("Moore"), opined that the cost to totally repair OBH is $14,451,023.34. (R p. 410:1-6). However, at trial, Moore reduced this estimate and presented "window" estimates that were much lower, ranging between $3,500,000 and $5,000,000 depending on the scope of repair performed. According to Moore, the cost to replace the windows and nothing more is $3,500,000; the cost to replace the windows and the cladding around the windows is $4,700,000; and, the cost to replace the windows, the cladding

[5] BFS claims that the Association was ultimately awarded damages that were for the same injuries paid for in pre-trial settlements. However, it is impossible for BFS to prove this because the Association was not previously paid for "loss of use" and BFS failed to ask the jury how much of its verdict was for "loss of use". *See* (R. p. 4503, para. 25) (BFS's abandoned JNOV ground that admits "it is impossible to know [what] the jury based its verdict [on]" because "the jury's award of $2,163,49[3] fails to state what damages were awarded. . .").

around the windows, and consequential structural damage related to the windows, is approximately $5,000,000. (R. pp. 410:13-411:8).[6]

The Association similarly reduced the damages it sought at trial by asking the jury to return a verdict of only $4,700,000 for "window repairs":

> Now at the time [Moore] 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.

(R. pp. 670:3-15; 673:6-15) (emphasis added); *see also* (R. pp. 670:16-671:7) ("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 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. . ."). (R. pp. 670:15-671:7).

The $4,700,000 verdict requested is less than the $4,888,523.34 difference that exists between OBH's total repair estimate ($14,451,023.34) and total settlements received prior to trial ($9,617,500). *Compare* (R. pp. 4678)[7] *with* (R. pp. 4214-4257); *see also* (R. p. 36).

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[6] Following Moore's testimony, the Association called homeowner, Mark Galvin, who testified as to systemic window leaks and extensive termite damage existing throughout OBH which was particularly localized below windows. (R. p. 491:11-12).

[7] Volume XII of the ROA contains confidential settlement agreements which were filed under seal.

The Association also asked the jury to include a loss of use award in its verdict. Moore opined that all 59 homeowners would have to vacate OBH for "12 to 14 months" during the repair of "the window[s] [themselves] and the immediate surround to tie [the windows] back in." (R. pp. 412:4-10; 413:11-14). The jurors were then asked to compute the loss of use that should be awarded based on the purchase contracts in evidence:

> Loss of use, yes there is evidence of loss of use. The evidence is they will lose use and you have Len's purchase contract in evidence that shows you what he paid for his residence and from that you can compute if you think that they are entitled to loss of use during move out for all these repairs. For the value of his condominium, you can compute what he should reasonably be rewarded or compensated for if he is forced to give up that condominium whether he lives full time, if he is forced to give up that for a year and move out, you can simply look to the purchase contract.

(R. pp. 698:15-699:1).

By limiting the damages requested at trial to loss of use and $4,700,000 for "window repairs," the Association asked the jury to compensate it for "different injuries" that were not previously paid for by other defendants. The $2,163,493 verdict the jury ultimately returned is millions of dollars less than what the Association requested. *Compare* (R. p. 46) *with* (R. pp. 667:9-670:15; 673:12-15) ($4.7 million verdict requested). BFS admittedly cannot prove what damages make up this verdict, and thus, cannot prove that the judgment entered overlaps with any damages purportedly paid for in pre-trial settlements.

E. BFS Tried Damage Allocation to the Jury

BFS also allowed the jury to decide what damages BFS was liable for after injecting other defendants, other injuries, and prior settlements into the trial.

BFS and the Association jointly introduced expert reports which outlined the window, roofing, door, floor, wall, siding, brick, stucco, balcony, garage, landscaping, plumbing, HVAC, and electrical defects affecting OBH. *See, e.g.* (R. pp. 3091-3241; 3242-4077, 4214-4257; 4258-4314; 4314-4331).By the time BFS rested its case, the exhibits in evidence included: (1) repair

estimates pricing all issues affecting OBH from both the Association's and BFS's perspectives; and, (2) window-specific repair estimates clearly dividing and separating damages attributable to BFS. (R. pp. 2317-3241; 3242-4213; 4214-4257; 4258-4313; 4314-4331)

BFS's counsel expressly asked the jury to allocate BFS's fault and liability based upon this evidence and considering: (1) the "many installation issues" and "other problems" plaguing OBH; (2) the "14 million dollar fix" sought to remedy "all problems"; (3) the amount of water intrusion it could attribute to the windows as opposed to these "other problems"; and, (4) the "other parties" who were more responsible for these "problems" because "BFS was just the middleman". *See* (R. pp. 223:04-224:22) (describing the "myriad of problems found" including "roof," "stucco," "siding", "wall", "brick", "waterproofing", "window", "flashing", and "sealant" problems and the "14 million dollars [sic] fix" for these problems); *see also* (R. pp. 220:10-12; 224:24-225:5; 225:10-231:14; 688:16-17; 689:7-18) (BFS's trial counsel telling the jury "it is all about money in this lawsuit," "BFS is the only one left to point the finger to," and implying that the Association should receive a damage reduction because the Association had been able to reach agreement with the "over forty" prior/other defendants).

Further, 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 "40 plus defendants" originally named in the suit) "came to an agreement" with, and therefore, paid the Association for their share of these "problems". *Id.*

After BFS rested its case, the Association proceeded with directed verdict motions. (R. pp. 622:4-635:10). Notably, when responding to the Associations' directed verdict motions, BFS's counsel indicated:

> 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 …

(R. p. 626: 2:10)(emphasis added).

> … 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.

(R. p. 626:21-24)(emphasis added).

BFS's counsel then proclaimed, "at the end of the day it is all about money in this lawsuit," (R. p. 688:15-17), proceeded to reference the "40 plus" defendants that were no longer in the case (R. p. 689:16-18), and placed "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.

(R. p. 689:7-18) (emphasis added).

STANDARD OF REVIEW

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 ends its jurisdiction over the case. *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 because "absolutely nothing remains to be done by [the Court] after the signing of the 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), SCRCP. Rule 59(e), SCRCP.

B. Setoff Generally

As a matter of law, a non-settling defendant is only entitled to setoff payments made by a joint tortfeasor for the same injury. S.C. Code § 15–38–50; *see also Smith*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("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); *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).

In contrast, a non-settling defendant is only entitled to an equitable setoff when necessary to prevent the plaintiff from obtaining a double recovery. *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, the result remains the same because BFS is not entitled setoff as either a matter of law or equity.

ARGUMENT

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

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

Rule 203 controls the timeliness 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 served 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).[8]

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[8] *See also* Rule 263(b), SCACR ("The time prescribed. . .for performing any act except the time for serving the notice of appeal. . .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); *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) ("Receipt of written notice is the critical event. . .Appellants received written notice on December 15, 2014—the date of the e-mail; [but,] failed to timely serve the notice of appeal 'within thirty. . .days after receipt.' Therefore, this court lacks appellate jurisdiction, and it's required to dismiss this appeal.") (emphasis added); Jean Hoefer Toal et al, *Appellate Practice in S.C.* 122 (3d ed. 2016) ("If a party

The circuit court entered the Final Order ending this case on September 22, 2016. (R. pp. 28; 30) ("The Court's Form 4 Order, issued on September 22, 2016, was the Final Order ending this case."); (R. p. 45) ("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 indicating no further action was required). BFS received written notice of this Final Order on September 27, 2016. (R. p. 4539). 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 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.

BFS did not move to reconsider the Final Order within ten days:

> BFS had ten days from receipt of the [the Final Order] to request this Court alter, amend, or reconsider its judgment. 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.

(R. pp. 30-31)(emphasis added) *citing* Rule 59(e) SCRCP; *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 Overland, Inc. v. Nance*, 423 S.C. 253, 257, 815 S.E.2d 431, 433 (2018) ("The failure to serve a Rule 59(e) motion within ten days of receipt of notice of [order entry] converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice

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fails to [timely serve the notice of appeal], the appellate court has no authority or discretion to rescue the delinquent party. . .").

of intent to appeal.") (emphasis added); *Zivitz v. Greenberg*, 279 F.3d 536, 539 (7th Cir. 2002) (noting a Rule 59(e) motion is an appropriate vehicle to request setoff of a jury's verdict).

BFS waited almost two years before serving its Notice of Appeal on June 29, 2018. *Compare* (R. p. 4672)(parties notified of the Final Order on September 27, 2016) *with* (R. pp. 4673-4675) (BFS did not appeal the Final Order until June 29, 2018). Therefore, this Court lacks jurisdiction and cannot consider the Final Order (including the judgment it entered against BFS) on appeal.

B. BFS'S Other Post-Trial Motions Do Not Save Its Appeal

BFS repeatedly references the retroactive effect of the circuit court's "*nunc pro tunc*" Final Order and suggests that because BFS filed its Motion to Compel and Second JNOV Motion within ten days of September 1, 2016, that these motions were timely. BFS's argument misunderstands the overarching point – even if these Motions were timely because they were physically submitted within ten days of the Final Order, BFS's attempt to reverse the Final Order on appeal is untimely because both Motions did not toll BFS's time to appeal the Final Order.

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

BFS's Motion to Compel did not toll its October 2016 deadline 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 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.

(R. p. 4493) (emphasis added); *see also* (R. p. 28).

BFS has not moved for setoff since it received these settlement agreements so no "setoff motion" or documentation of entitlement thereto exists. (R. p. 29) ("[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"); *see also* Jean Hoefer Toal et al., *Appellate Practice in S.C.* 57-58 (3d ed. 2016) ("The record should contain evidence that an issue has been properly raised to the [circuit court]. Thus, normally, motions must be made on the record to be preserved [at trial for appellate review]"). There is only this Motion to Compel which: (a) the trial judge was not copied on;[9] (b) does not reference "Rule 50", "Rule 59", "alter", "amend" or "reconsideration";[10] (c) does not indicate that BFS will move for any sort of "equitable" relief;[11] and, (d) does not challenge the Final Order.[12] BFS provides no authority supporting its conclusory assertion that its Motion to Compel, which did none of these things, tolled BFS's time to appeal.

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. (R. p. 31, n. 3). This is the case because BFS already moved for JNOV, the Circuit Court already denied BFS's first JNOV Motion, and BFS does not appeal this denial. (R. p. 744:2-12); *see also* (BFS Brief at 4, n. 7) (BFS conceding that its trial counsel first made "an oral JNOV motion without asserting any new trial grounds [at the close of evidence],

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[9] *See* (R. p. 28); *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 give the judge a copy of a Rule 59 Motion within 10 days, as stated in Rule 59(g), precludes the Motion).

[10] *See* (BFS Brief at 10) (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).

[11] *Compare* (BFS Brief at 20) (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) *with* (R. p. 4493) (referencing "equitable setoff" nowhere).

[12] *See* (BFS Brief at 12-13) *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).

rather than requesting a ten day period to file such motions as was understood by [it's post-trial counsel]."); (BFS Brief at 14) (admitting "post-verdict motions were made immediately after the verdict"). This is an important point: BFS did not file a Rule 59(e) Motion asking the circuit court to reconsider any aspect of its denial of BFS's first JNOV Motion and BFS did not include this denial in its Notice of Appeal. (R. pp. 4673-75). Because BFS did not appeal this denial, it is precluded from appellate consideration. *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 542-43 (2014) ("As a matter of procedure. . .Appellants have only appealed. . .the Dismissal Order. As such, the merits of the underlying discovery orders. . .are not before us for consideration.") (emphasis added).

BFS's Second JNOV Motion is also precluded from appellate consideration because it is a "successive" motion that asked the circuit court to again rule on issues already ruled upon or rule upon issues never raised. (R. pp. 4494-4505). To be clear, BFS's Second JNOV Motion:

- Expressly moves the for "(1) JNOV" (R. p. 4494);
- Attempts to renew the directed verdict motion which was never made "at the close of the evidence in full." (R. p. 4494);
- Argues that "BFS is entitled to JNOV" without mention of the denial of BFS's first JNOV Motion. (R. pp. 4495-99);
- Indicates that "if the Trial Court denies BFS's JNOV Motion," BFS moves for a New Trial Absolute as its first alternative. (R. pp. 4499; 4503);
- 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. (R. p. 4504); [13] and,

[13] 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. (BFS Brief at 4, n. 7). Notably, on appeal, BFS does not argue the remaining grounds it did not withdraw or that the circuit court should have considered any aspect of its Second JNOV Motion. BFS's abandonment of these arguments is telling – if BFS truly believed that its Second JNOV Motion was properly made, why does BFS make no substantive JNOV argument on appeal? The answer is that BFS's post-trial counsel realizes the Second JNOV Motion is procedurally barred, but has no choice but to mischaracterize

- Concludes without mentioning the words "alter," "amend", or "reconsideration" anywhere throughout its 12 pages. (R. pp. 4494-4505).

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 wherein the jury found against defendant trucking company ("I-Corp") on plaintiff trucking company's ("Quality Trailer") promissory estoppel and successor liability claims.[14] *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.[15] *Id.* at 218, 562 S.E.2d 615-16. The circuit court, recognizing the duplicity between the two motions, denied the Second Motion. *Id.* On appeal, our Supreme Court affirmed the circuit 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. . . 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

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this Motion as a Rule 59(e) Motion and then try to bootstrap a separate Motion to Compel (which was also not made per Rule 59) into the tolled-appeal window afforded to Rule 59(e) Motions.

[14] During trial, I-Corp moved for directed verdicts on 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).

[15] 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. Like I-Corp, BFS's Second JNOV Motion is not, in substance, a Rule 59(e) Motion. (R. pp. 4494-4505).

> 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).[16]

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

[16] 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 argue its Second JNOV Motion is not successive, the Association notes the circumstances 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 specific grounds whereas Fields did. Notably, the *Fields* Court also did not find the entirety of the second JNOV Motion at issue there proper; rather, the Court found only certain grounds, relating to evidentiary rulings, were properly raised because only these grounds were stated in support of the first 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 second JNOV motion are improper.

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 circuit court's denial of BFS's first JNOV Motion and its Final Order entering an unaltered judgment. (R. p. 22; 744:2-12) *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 a court's ruling on an initial Rule 59(e) Motion does not substantially alter the 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 appeal when the court's order denying the first Rule 59(e) motion did not alter judgment).

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

First, BFS's Second JNOV motion was not grounded in a directed verdict motion made at the close of all evidence as required. *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). 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:

> 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. . .[w]hen 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 v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006); *see also RFT Mgmt. Co., LLC v. Tinsley & Adams*, L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) *quoting Wright*; *State v. Bailey,* 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006) (noting a defendant must move "for a directed verdict at the close of all evidence in order to appeal the sufficiency of the evidence.") (emphasis added).

Here, like in *Wright*, BFS moved for directed verdict at the close of the Association's case, but did not renew its motion at the close of all the evidence. *Compare* (R. pp. 491:15-494:19) *with* (R. p. 635:9-10) (The circuit court asking BFS if it had any motions at the close of the evidence, and BFS responding "No"). 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.

Second, BFS failed to request ten days to file its Second JNOV Motion. *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);[17] *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). Because BFS did not request leave to its file post-

[17] 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).

trial motions as required by applicable court rules, this Motion is improper and not preserved for appellate consideration. Rules 50, 59, SCRCP.

4. BFS's *Ellis* and *Tilley* Arguments are Without Merit

BFS relies on two cases, *Ellis* and *Tilley*, in support of its argument that its self-described "setoff motion" (which, in reality, is a motion to compel), was timely. (BFS Brief at 11-13) *citing Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003); *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). BFS's reliance is misplaced for multiple reasons.

First, neither *Ellis* nor *Tilley* involve an unchallenged verdict or an untimely Notice of Appeal. *Tilley*, 355 S.C. at 366-67, 585 S.E.2d at 294-95 ("The Court affirmed summary judgment on the issue of liability and remanded for a determination of damages. This appeal was taken following the circuit court's damage determination [which included deciding Pacesetter's setoff request]") (emphasis added); *Ellis,* 335 S.C. at 109-10; 515 S.E.2d at 269-70 (indicating Doctor Oliver immediately appealed the "jury award" and "during the pendency of his appeal, he filed a motion seeking to reduce the jury's award by the amount of the settlement [Ellis] received from [the hospital].") (emphasis added).

Second, *Ellis* involved a "negligence action" with joint "tortfeasors" and the settlement amount ultimately subtracted from Ellis's jury award equaled the hospital bills incurred by Ellis as a result of the hospital's negligence. *Ellis,* 335 S.C. at 109; 515 S.E.2d at 269. Here, negligence is not at issue because BFS was not found liable in negligence.[18]

Third, *Tilley* does not concern alleged joint-tortfeasors or even multiple defendants; rather, the single Defendant ("Pacesetter") sought equitable setoff for amounts Pacesetter itself had already effectively paid to Plaintiffs by virtue of writing-off Plaintiffs' debts. *Tilley*, 355 S.C. at

[18] And, as discussed in Section D, *supra*, BFS is also not a joint "tortfeasor".

376-7, 585 S.E.2d at 299-300 ("Pacesetter should be allowed to setoff the award by the amount of principal Pacesetter has written off per class member."). Equitable setoff is not at issue here because BFS **has never made a motion for equitable setoff**. *Compare* (R. p. 37) ("[BFS's] Motion specifically limits itself to statutory setoff, not equitable. In addition to not requesting equitable setoff in its [M]otion, BFS never plead equitable setoff in any of its three Answers.") *with* (BFS Brief at 12) (acknowledging *Tilley* involved equitable setoff). Because BFS never raised "equitable" setoff before the circuit court, this issue is not preserved and this Court should disregard BFS's equitable arguments.

Fourth, *Tilley* involved a setoff motion actually made between the liability and damages phases of trial. *Tilley*, 355 S.C. at 377, 585 S.E.2d at 300 ("[W]e see no reason why Pacesetter cannot request setoff before the circuit court during the damages portion of the case.") (emphasis added). Since there was a setoff motion made in *Tilley* before the damages phase of trial which the circuit court ruled on before calculating the judgment, *Tilley*, like *Smith*, stands for the proposition that setoff is to occur before the judgment is entered. *Tilley, Smith, supra*. This is contrary to BFS's main argument that a court may decide setoff at any time – with or without a motion being made.

C. The Law of the Case Doctrine and Two-Issue Rule Mandate that the Circuit Court be Affirmed

BFS's procedural errors prove fatal to BFS's entire appeal because no argument BFS asserts can change the fact that the $2,163,493 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*, 398 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."); *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"); *Continental Ins. Co. v. Shives,* 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App. 1997) (appellate court must assume an unappealed ruling is correct).

Here, there were only two "judgment rulings": (1) the Final Order entering the judgment; and, (2) the circuit court's oral denial of BFS's first JNOV Motion. BFS did not timely appeal the Final Order and does not appeal the denial of its first JNOV Motion. (R. pp. 4673-4675). As such, the judgment stands as the law of the case and it's procedurally impossible for this Court to reverse the judgment because BFS did not challenge it. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("[D]ifferent preservation rules apply to an *appellant*—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.") (emphasis in original and added).

2. The Judgment Stands Under the Two-Issue Rule

Second, the judgment stands under the two-issue rule because the jury returned a general verdict that involved two or more issues and the verdict is supported as to at least one of these issues (breach of express 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 involving two or more issues, and the verdict is supported as to one issue, the verdict stands).[19]

The jury awarded the Association $2,163,493 on separate causes of action: strict liability and breach of warranty. As such, the Association may rely on either breach of express warranty, breach of implied warranty or strict liability in the context of analyzing whether the jury's verdict is supported despite BFS's setoff arguments. Breach of express warranty sounds in contract,[20] and is not subject to setoff under the joint tortfeasor statute. (R. p. 31) *Atkinson v. Orkin Exterminating Co.*, 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) ("Atkinson Order")[21] (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).[22] 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 circuit court also entered) stands regardless of whether setoff is applicable to the jury's strict liability or breach of implied warranty verdict.

Assuming the circuit court's "invocation of the two-issue rule [was] legally erroneous" because it "can only be invoked on appeal" as BFS contends, this error was harmless because this

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[19] *See also Cole v. Raut,* 378 S.C. 398, 406, 378 S.E.2d 30, 34 (2008) ("The [two-issue] rule is consistent with the established notion that the appellate courts in this State exercise every reasonable presumption in favor of the validity of a general verdict.") (citations and quotations omitted).

[20] 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.").

[21] The *Atkinson* Order was attached to Respondents' Motion to Dismiss as Exhibit H at R. pp. 4576-4580.

[22] *See also* Argument D, *infra*.

Court can and should apply this rule to reach the same conclusion as the circuit court – that the verdict rendered on the Association's breach of express warranty claim is supported because setoff does not apply to this verdict. (BFS Brief at 20). Even BFS admits "[a]ppellate 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." *Id.* (citations and internal quotations omitted) (emphasis added). Further, BFS cursorily claims the two-issue rule is inapplicable for only one reason – because BFS "does not seek to reverse the jury's verdict or the judgment resulting from it". (BFS Brief at 20). Yet, the last sentence of BFS's brief clearly asks this Court to "reverse the order and judgment of the [circuit] court". (BFS Brief at 34) (emphasis added). Thus, by BFS's own words, the two-issue rule is applicable and should be applied here.

D. BFS is not Entitled Setoff because BFS is not a "Joint Tortfeasor"

The circuit court also correctly concluded that setoff is, as a matter of law, only available to "joint tortfeasors" which, as a matter of both law and fact, BFS is not. (R. pp. 31-44).

1. Setoff is Only Available to "Joint Tortfeasors"

Section 15-38-50 of the South Carolina Contribution Among Tortfeasors Act (the "Act") 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 . . .**:
>
> (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. (R. p. 27); (Atkinson Order) (finding non-settling defendant was not entitled to setoff a breach of contract verdict because settling defendant did not qualify as a "joint tortfeasor" as to this claim; but, non-settling defendant was entitled to setoff a negligence verdict), *rev'd on other grounds, Atkinson*, 361 S.C. at 172, 604 S.E.2d. at 393-94 (finding the circuit court erred in treating defendants as "joint tortfeasors" and setting off the negligence verdict).[24] BFS does not qualify, and thus, the Court's analysis can end here.

2. BFS is Not a Joint Tortfeasor Under *Atkinson*

First, BFS does not qualify as a "joint tortfeasor" because the jury found BFS liable in contract[25] and awarded damages based upon BFS's failure to fulfill its contractual obligations. No other defendant can be held liable for BFS's contractual obligations.

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[23] These terms are clear and should be applied using their literal meanings. *Ellis*, 335 S.C. at 110, 515 S.E.2d at 270 ("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).

[24] *See also Mercy Medical Center v. Julian*, 429 Md. 348, 56 A.3d 147 (2012) (One who is not 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) (Arizona courts refuse to require a setoff of settlement amounts where the liability of the defendants is several rather than joint and several); *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.").

[25] *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") (emphasis added).

a. Atkinson Makes Clear Setoff Does Not Apply Here

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.[26] *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 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 circuit 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

[26] 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.*

> addressed to a particular cause of action. Defendant's counsel's cover letter states setoff 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 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 circuit 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 that one must qualify as a "joint tortfeasor" in order to be entitled to setoff as a matter of law. Second, these opinions establish that 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."[27] Applying these opinions to the

[27] Court in other jurisdictions have also found statutes permitting setoff between joint tortfeasors are not applicable to contract-based claims. *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.

instant case means BFS is not entitled to set off the jury's award based on breach of express warranty because this is a contractual claim for which BFS is independently liable.[28] Fourth, *Atkinson* establishes that even if two actors' separate acts or omissions cause a single damage or wrong that does not make the two actors *ipso facto* joint tortfeasors, i.e., one cannot back into joint tortfeasor status for purposes of setoff and simply ignore hornbook law otherwise.

b. BFS's Attempts to Distinguish Atkinson from This Case are Unavailing.

First, BFS contends "no theory of tort or products liability was asserted against Terminix, and therefore, the common cause of action requirement of application of [setoff] was not present [in *Atkinson*]." (BFS Brief at 19). This is incorrect. Negligence, a tort, was asserted against Terminix. The application of setoff to both contract and negligence claims was also present in

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Apr. 28, 2008) (the one satisfaction (setoff) rule does not apply to claims brought in contract); *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 roof defects, contractor filed third-party complaint against roof truss manufacturer; but, contractor was not entitled to contribution from manufacturer since they did not qualify as "joint tortfeasors" because contractor was liable for breach of contract and manufacturer was liable for negligence).

[28] Although a novel issue, BFS should not be 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.") (emphasis added) (citations omitted). In strict liability, apportionment based upon fault is impermissible as this theory does not contain an element of fault. *See, e.g., Talkington* and *Bragg*, *supra*. Without fault, there can be no "joint tortfeasor" and no setoff. This contrasts with negligence where liability is allocated among joint tortfeasors according to percentages of comparative fault.

Atkinson or else the court would not have concluded that Orkin and Terminix were not "joint tortfeasors" entitled to "setoff" the verdict on either claim.

Second, BFS suggests that *Atkinson* is inapplicable because it concerned "solely a breach of contract involving services" versus a breach of express warranty "involving products". (BFS Brief at 19). This is also incorrect. The contract at issue in *Atkinson* included a "lifetime termite damage guarantee" which contained a transferability provision allowing original purchasers to transfer the guarantee to subsequent purchasers. *Id.* at 160, 604 S.E.2d at 387-88. After moving into their home, the Atkinsons attempted to transfer this guarantee to them pursuant to this provision; however, Orkin refused and this refusal was the basis of Atkinson's breach of contract claim. Here, BFS entered into a contract that expressly guaranteed the windows it supplied to One Belle Hall were defect free; however, the windows are were not defect free and this is the basis of the Association's breach of express warranty claim. There is no discernable distinction between these two cases – both involved contractual obligations that were breached by the "sole" defendant who agreed to obligate itself, and a result, is "solely" liable for failing to fulfill its obligations.

Third, BFS claims that *Stoneledge* supplants *Atkinson*; however, *Stoneledge* did not involve an express warranty. (BFS Brief at 14-15) *citing Stoneledge at Lake Keowee Owners' Ass'n Inc. v. IMK Development Co., LLC*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018). Rather, *Stoneledge* involved an association who went to trial against certain developers on four claims: negligence, breach of implied warranty of workmanlike service, breach of implied warranty of habitability, and breach of fiduciary duty. *Stoneledge*, 425 S.C. at 285-86, 821 S.E.2d at 514.[29]

[29]While a breach of "implied" warranty claim may arise in both contract and tort, a breach of express warranty claim, like the one here, arises exclusively in contract.

Further, at the *Stoneledge* trial, the association requested a verdict "for the full amount required to bring the damaged buildings up to the quality at which they were marketed" unlike this Association who requested a verdict for "window-only" related damages. *Compare Stoneledge,* 425 S.C. at 286, 821 S.E.2d at 514 *with* (R. pp. 669:22-670:15; 673:9-15)(discussing reduced, window only damages).[30]

Also unlike here, developers actually moved for setoff either before or immediately after the verdict was returned in *Stoneledge*, and, like *Tilley* and *Smith*, setoff was decided before the judgment was finally entered.[31] *Id.* ("The jury was dismissed [and] the trial court held a post-trial hearing on several motions after releasing the jury. Among these motions was a motion for setoff. . .After several motions for reconsideration, the trial court entered judgment. . .") (emphasis added); *see also Tilley, Smith, supra*. The *Stoneledge* developer also appealed the circuit court's final order and argued that the court's "final entry of judgment [did] not correlate with the jury's verdict" This Court agreed, finding:

> It appears the trial court amended the jury's verdict. . .[I]n doing so, the trial court invaded the province of the jury. *See Joiner v. Bevier*, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930) ("It is [the judiciary's] duty to enforce a verdict, not to make it."). Therefore, we find the jury's verdict, and its allocation of damages to the three **separate** causes of action, should be reinstated.

Id. (emphasis added). While this Court then proceeded to allocate the *Stoneledge* net verdict based upon settlements received prior to trial, it did so because there was a circuit court ruling that already

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[30]The *Stoneledge* jury ultimately returned a "$5,000,000-$3,000,000" verdict against two developers on the association's negligence claim and a $1,000,000 verdict against the same two developers of the association's breach of implied warranty claim. *Stoneledge,* 425 S.C. at 286, 821 S.E.2d at 514.

[31] After setoff, the judgment entered was against only one developer for negligence in the amount of $857,635.29 and breach of implied warranty in the amount of $2,144,088.23. *Id.* And, the circuit court held additional proceeding following the verdict to allocate fault amongst the *Stoneledge* developers – the jury apportioned 40% of fault to one developer for negligence and 70% of fault to the same developer for breach of implied warranty. *Id.* at 302, 821 S.E.2d at 522.

found the developer was entitled to setoff and only apportioned the awards for the negligence and breach of implied warranty causes of action. And, the association did not appeal the setoff ruling or the final judgment in which setoff was applied. *Id.* at 284, 286, 821 S.E.2d at 513-14 (noting only developers appealed after the court entered its final judgment).

Not only is this case procedurally distinguishable because BFS failed to move for setoff; the Court never ruled that BFS was entitled setoff; and, BFS failed to appeal the Final Order, it is factually distinguishable because BFS independently agreed to pay for these leaky windows at no expense to others and the Association did not request the jury return a verdict for the full amount needed to repair all buildings – just the leaky windows BFS guaranteed. As a result, *Stoneledge* does not control the setoff analysis here.

E. BFS Contractually Assumed Responsibility for All Damages Awarded

BFS is also not entitled a setoff because BFS contractually assumed sole responsibility for all damages attributable to its failures. (R. pp. 1147). ("[BFS] shall replace at its own cost and expense defective items. . .Should any defects develop. . .due to improper workmanship and/or arrangement, the same shall. . .be made good by this Subcontractor at no expense to [Owner]").

BFS cannot claim it is entitled to setoff damages awarded for breach of warranty when BFS's warranty assumed sole responsibility for all damages. (R. pp. 42-43) *citing Wachovia Bank v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *see also 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).

BFS offers only one argument to support its assertion that BFS did not contractually waive its right to setoff – that this action was not "reasonably foreseeable" to BFS. (BFS Brief at 33-34). BFS does not cite to a single piece of supporting evidence or testimony, and thus, BFS has also waived this argument. Additionally, "reasonable foreseeability of a lawsuit" is not the waiver standard – the waiver standard is whether BFS "intentionally" and "voluntarily" relinquished a known right. BFS, a nationwide, sophisticated material supplier, knew it had the right not to enter into agreements under which it indemnified others and assumed the sole responsibility for paying "all costs and expenses" related to any defective windows it supplied; but, as conceded at trial, BFS "voluntarily" and "intentionally" entered into these agreements, giving up any "rights" it had to the contrary, contribution, allocation, set off or otherwise. (R. pp. 475:25-478:25; 1106-09; 1851-2099); *see also* (R. pp. 42-43); *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it."). Even if "reasonable foreseeability of a lawsuit" was the standard, BFS obviously "knew" that lawsuits happen or else there would not have been an "arbitration provision" included in the purchase order it entered. (R. pp. 1106-09).

F. BFS is not Entitled Setoff Based on This Court's Recent Decision in *The Oaks*

BFS is not entitled setoff because the Association reduced its damages at trial to account for the total amount received in pre-trial settlements. In *The Oaks*, this Court recently found setoff was inappropriate in this instance:

> [*The Oaks'*] plaintiffs filed suit against multiple entities involved in the construction of a thirty-six (36) unit condominium complex alleging a wide range of defects that resulted in widespread water intrusion and damages. Prior to trial, plaintiffs settled with a number of defendants, including the window manufacturer, window installer, caulking subcontractor and framer. The remaining defendants proceeded to a bench trial and were found jointly and severally liable for negligence, gross negligence, and negligent misrepresentation,[32] as well separately liable for various other causes of action. The court awarded the plaintiffs $7,934,704.06 in damages for the cost of repair. Thereafter, defendants moved for setoff. The trial court denied the motion, and an appeal followed.
>
> Both at [trial] and on appeal, the defendants argued the evidence presented at trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the trial court's failure to setoff the verdict by the prior settlement amounts resulted in a double recovery. The plaintiffs countered, arguing that the defendants were not so entitled because the plaintiffs reduced their damages to account for amounts received from settlements, and thus, the defendants had already received a reduction in damages. . .
>
> Subsequently, this Court zeroed-in on the *self-imposed*, pre-trial reduction in damages claimed by the plaintiffs to reflect those amounts already paid out by the settling subcontractors; for example, the plaintiffs "removed from their claim the repairs necessitated by the damage caused by the window installation." Put differently, the plaintiffs recognized that the work of the window manufacturer, window installer, caulking subcontractor and framer contributed to the water intrusion at the property; accordingly, the plaintiffs reduced their cost of repair estimate at trial by $4,260,497.93, a sum which exceeded the amount paid by the aforementioned subcontractors in pre-trial settlements. By virtue of this reduction, [this Court] held that defendants "already received the benefit of the settlements", rejected the notion that failing to further reduce the verdict would constitute a double recovery for the plaintiffs, and affirmed the trial court's denial of [setoff].

(R. pp. 33-35) *citing The Oaks at Rivers Edge Property Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017) (citations omitted).

Like *The Oaks*, this Association reduced their repair estimates at trial by more than the amount it received in pre-trial settlements. OBH's total repair estimate is $14,451,023.34 whereas

[32] Therein lies a notable distinction between *The Oaks* and this case that is favorable to this case: unlike the defendants in *The Oaks*, here BFS was *not* found liable by the jury for negligence or gross negligence. In that regard, the plaintiffs in *The Oaks* did not argue that the Act did not apply, as the Association does here.

pre-trial settlements totaled $9,617,500. (R. p. 4678). The difference between these two numbers equals $4,883,523.34 which is: (1) $183,523.34 more than the $4,700,000 "window" repair damage award sought at trial; and, (2) $2,720,030.42 more than the jury's verdict and final judgment. *Compare* (R. p. 46) *with* (R. pp. 410:13-411:8; 669:22-670:15; 673:9-15) (discussing the Association's reduced repair estimates at trial). As such, BFS is not entitled a setoff because, according to this Court in *The Oaks*, BFS "already received the benefit of the pre-trial settlements". *The Oaks, supra*; *see also* (R. p. 33) ("BFS already received the benefit of the pre-trial settlements: first, by virtue of [the Association's] reduced claim for damages at trial, and again by the jury's further reduction reflected in the settlement amount. The relief BFS now seeks would result in a *double*, or even *triple* setoff, which is not contemplated either by the Act or principles of equity.").

While BFS relies on *Broome versus Watts* to suggest that setoff "is not a jury issue"[33] and to confuse the applicability of *The Oaks'* decision here, BFS misses the mark. (BFS Brief at 25). There is no discernable distinction between the Associations in *The Oaks* and this case – both reduced their damages for more than what they were compensated for pre-trial. What this Court held in *The Oaks* is that in instances, like here, where a plaintiff reduces its damages at trial to account for pre-trial settlements, a court should not further reduce the verdict rendered by applying setoff.

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[33] (BFS Brief at 25-26) *citing Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995). Unlike here, *Broome* involved a car wreck with a single, at-fault driver where the Defendant's insurance company paid its limits of $50,000. *Id.* at 337-9, 461 S.E.2d at 47. Plaintiffs' UIM carrier assumed the defense, the case proceeded to trial, and Plaintiffs received a jury award of $97,500. *Id.* The trial court setoff this award by $50,000 because the Under Insured Motorist Statute provides that a UIM carrier is only liable for damages exceeding liability limits. *Id.* at 341, 461 S.E.2d at 48; *see also* (S.C. Code Ann. § 38-77-160).

Importantly, the *Oakes* holding makes sense, and to hold otherwise would chill settlements and clog the courts. To hold otherwise would be to establish a rule that the plaintiff must always prove a full set of damages in a multi-party complex case, no matter how circumscribed the remaining unsettled issue/damage. Stated differently, if the plaintiff still has to prove his, e.g., stucco defects, the incentive to settle with the stucco subcontractor is reduced.

G. BFS Tried Damage Allocation to the Jury

BFS already received the setoff it seeks because the way this case was tried allowed the jury to "set off" any damages it did not allocate to BFS.

In *McCurry versus Keith*, this Court confronted a scenario in which a circuit 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 circuit court awarded plaintiff $3,560. *Id.* Plaintiff made a Rule 59(e) motion requesting the circuit court reconsider its order, arguing the circuit court erred by providing the defendants a setoff of $5,000 when the defendants failed to formally request setoff. *Id.* The circuit court denied the motion, holding plaintiff "waived her right to contest that any type of setoff should be allowed" because "she brought up her winnings and testified about her winnings without any objection." *Id.* This Court 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) (denying setoff because a prior settlement "was understood by the parties" to cover different damages than the damages sought at trial.).

Here, like *McCurry*, the damage allocation was tried by BFS to the jury. The jury understood OBH experienced multiple defects and damages because the parties jointly introduced evidence, including expert reports, photographs, and repair estimates, detailing the myriad of problems these 59 homeowners continue to suffer. (*See, e.g.*, R. pp. 3091-3241; 3242-4213; 4214-4257; 4258-4313; 4314-4331); *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 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 and to consider: (1) the "many installation issues" and "other problems" plaguing OBH; (2) the amount of water intrusion it could attribute to the windows as opposed to these "other problems"; and, (3) the "other parties" who were more responsible for these "problems" because "BFS was just the middleman". R. pp. 220:10-12; 224:24-225:5; 225:10-231:14; 688:16-17; 689:7-18) (BFS's trial counsel telling the jury "it is all about money in this lawsuit" and implying that the Association had already been paid by "over forty" defendants).

After so considering, the jury did exactly what BFS asked it to do – It found BFS liable for its share which it determined was $2,163,493. There is simply no basis for setoff under these

circumstances. BFS agreed to allow the jury to allocate fault and damages;[34] and, allowing BFS to insist that damages be allocated to other parties and to take credit for settlements paid by other parties would result in a double reduction for BFS which should not be permitted. A verdict simply cannot be reduced **both** because of damage caused by others **and** for amounts paid by others.

The same is true in instances, also like here, where a defendant asks the jury to decide its liability after introducing evidence of other parties, other problems, and other settlements. In this circumstance, the court should not set off a verdict that a defendant already argued to the jury should be reduced because other people paid the plaintiff.

H. BFS Cannot Meet Its Setoff Burden On Appeal

BFS repeatedly states that the Association recovered for "the same injuries and claims" without any supporting evidence. In its brief, BFS does not ask this Court to setoff a specific number or settlement. BFS does not explain how any of the settlements "totaling 9.5 Million dollars" compensated the Association for "windows," "loss of use", "breach of warranty" or "strict liability". (BFS Brief at 5). What amount of the garage, roof, balcony, insulation, door, floor, siding, stucco, brick, landscaping, plumbing, HVAC, or electrical settlements overlap with what the jury awarded the Association? How does the settlement by the window manufacturer overlap

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[34] When responding to the Association's directed verdicts motions, BFS's trial counsel indicated:

> 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. ...

(R. p. 626:6-10) (emphasis added).

> 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.

(R. p. 626:21-24) (emphasis added).

with loss of use and was this settlement for breach of warranty or strict liability as opposed to negligence?[35] BFS cannot answer these questions so it repeats its "same injury" and "same claim" phrases in hopes this Court will take the bait. This Court should not. Since BFS already submitted its brief, it abandoned any chance it had to answer these questions.

Not only has BFS abandoned this issue, it is impossible for BFS to prove that the verdict overlaps with the "same" damages or claims already compensated. The Association asked the jury to return a 4.7 million dollar verdict that focused on windows and accounted for all pre-trial settlements. (R. p. 36) ("[Plaintiffs] asked the jury to award $4,700,000 in damages.").

Additionally, no pre-trial settlements paid the Association for loss of use – a "different" injury the Association asked the jury to include in its verdict. The Association's repair estimator, Gary Moore, opined that all 59 homeowners would have to move out of OBH for "12 to 14 months" for window repairs alone. (R. pp 412:4-10; 413:11-14). The jury was then asked to compute the loss of use that should be awarded by comparing the purchase contracts in evidence to this shortened, move out time frame. (R. pp. 698:15-699:1). Thus, loss of use could make up most, if not all, of the jury's entire award. Neither BFS nor this Court can dissect the jury's verdict to find out.

At the end of the day, BFS consented to a general verdict form and did not ask the jury to specify "the injury" for which it was compensating the Association. (R. pp. 39-40; 4670). Because BFS failed to request a special verdict form or submit special interrogatories, there is no evidence

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[35] While BFS contends that the circuit court erred by failing to "examine these settlements" that "allegedly" were for the same injury and cause of action, the circuit court did examine these settlements and found that the only settlement that "may have any applicability [was] the settlement by the window manufacturer." *Compare* (BFS Brief at 32) *with* (R. p. 41). The circuit court rightfully reasoned that this settlement was for negligence, BFS could not prove otherwise, and thus, this settlement could not reduce the verdict returned against BFS on different causes of action based on the law. (R. pp. 40-42)

in the record to indicate how the jury calculated the award against BFS. (R. pp. 39-40).[36] Without this evidence, there is nothing which proves that the Association received a double recovery.

Realizing this, and that it cannot meet its setoff burden, BFS manufactures two arguments that stand for the proposition that (a) products liability cases are always subject to setoff; and (b) setoff is always a function of the pleadings versus the facts proven. This Court should reject both.

First, BFS maintains that all claims asserted in the "products liability" context "contain the same common elements of proof and damages" and are really one in of the same such that setoff is always applicable in this context. (BFS Brief at 16-20). There is no South Carolina authority that supports this proposition and BFS's contention misunderstands products liability law. A plaintiff does not win on every single claim asserted in a products liability case when he or she proves the three products liability elements. Rather, the plaintiff must prove the required elements for each claim, which are different for negligence, strict liability, and breach of warranty, plus the three product liability elements.

Contrary to BFS's point, this is what *Jackson* is indicating when it held that:

> In 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) [injury] by the product; (2) the injury occurred because the product was in a

[36] *See also Stoneledge,* 425 S.C. at 302, 821 S.E.2d at 522 ("It appears the trial court amended the jury's verdict. . .[I]n doing so, the trial court invaded the province of the jury. . .Therefore, we find the jury's verdict, and its allocation of damages to the three separate causes of action, should be reinstated."); *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); *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); *Hawkins v. Pathology Assocs. Of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (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 setoff); *Zivitz*, 279 F.3d at 540 (defendant bears the burden of proving he is entitled to setoff on grounds that damages awarded were for the same injury for which settling defendants had already compensated plaintiff and cannot do so without special interrogatories).

> 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.

(BFS Brief at 16) *quoting Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009) (emphasis added).

Notably, BFS omitted the sentence following this quote which indicates that the separate claims brought in the products liability context have different elements of proof: "[i]n addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Jackson*, 383 S.C. at 15, 677 S.E.2d at 614.

BFS also misquotes *Herring*. (BFS Brief at 18-19) *citing Herring,* 350 S.C. at 373, 565 S.E.2d at 773. *Herring*, like *Atkinson*, indicates "[b]reach of warranty is an action affirming [a] contract" and goes on to detail how breach of warranty and revocation of acceptance are "independent, discrete causes of action" even in the products liability context. *Herring*, 350 S.C. at 379, 565 S.E.2d at 776 (emphasis added).

In sum, BFS's theory is inconsistent with South Carolina law which has recognized that there are "obvious differences" between the "separate claims" that may be brought in the products liability context.[37] *See, e.g., 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.").[38]

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[37] BFS's theory is also irreconcilable with the law as charged to the jury (without any objection by BFS) which highlighted the different elements and different damages the Association had to prove to win on their strict liability and breach of warranty claims. (R. pp. 709:21-728:15).

[38] *See also Bragg,* 319 S.C. at 538-39, 462 S.E.2d at 326 *citing Griggs v. BIC Corp.*,981 F.2d 1429, 1435 (3rd Cir.1992) ("there is an important theoretical basis for separating and maintaining

Second, BFS argues at length about the damages "as pled" and claims these "alleged damages" are the "same damages" proven against BFS. (BFS Brief at 27-31). BFS's argument conveniently ignores its own pleadings in which BFS claimed the opposite. In a pre-trial motion, BFS specifically pled that there is no joint liability for the damages awarded against it because any damages BFS is "found liable" for are "clearly divisible" from those attributable to other, previously-settled defendants:

> 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.

(R. pp. 4490) (emphasis added).

Thus, according to BFS, the "alleged damages" it references throughout its brief are not the same damages that were proven against BFS because these damages are "clearly divisible". BFS now claims this concession "is irrelevant" because it was made pre-trial; yet, BFS bases most of its argument on similar, pre-trial allegations. *Compare* (BFS Brief at 26) *with* (BFS Brief at 15, 22, 30-32). BFS cannot have it both ways. (R. pp. 38; 43).

I. Setoff is not Necessary to Provide Justice between the Parties

Assuming BFS can maintain it is entitled an equitable right to setoff after failing to ever plead or move of equitable setoff relief, an "equitable" setoff is also inappropriate here because the jury's verdict is fair – the circuit court rightfully found that the jury awarded damages it allocated individually to BFS based upon BFS's individual fault. (R. pp. 38-9) *citing 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 setoff

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the difference between negligence and strict liability law in the products liability context; namely, the underlying analysis necessary to reach each legal conclusion giving rise to liability are qualitatively different in that the social policy determination as to product defect in strict liability is not the equivalent of a determination of duty in negligence law.").

a judgment should only be "exercised when necessary to provide justice between the parties.") (emphasis added).

The jury's verdict is millions less than the "window-only" verdict the Association requested, is not duplicative of any settlement funds received, and, most certainly, does not amount to any windfall. To the contrary, any setoff of the damages the jury awarded Association as a result of BFS's conduct would result in a windfall to BFS by allowing it to avoid its contractual obligations. *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, setoff is not required to provide justice between these parties because justice has been provided.

CONCLUSION

In sum, this Court should dismiss this appeal for lack of jurisdiction because BFS failed to timely appeal the Final Order ending this action. Even if this Court had jurisdiction over this appeal, this Court should find that the only substantive question raised by BFS, whether it is entitled to a setoff, is immaterial because judgment against BFS stands under the law of the case doctrine and the two-issue rule. Even if this were not the case, this Court should find that BFS is not entitled to set off the judgment on the merits because: (1) BFS is not a "joint tortfeasor"; (2) BFS owed independent obligations which resulted in independent damages; (2) BFS contractually assumed sole responsibility for all damages awarded and waived its ability to setoff these damages; (3) BFS already received the benefit of pre-trial settlements; (4) BFS effectively tried damage allocation to the jury; (5) BFS cannot meet its setoff burden; and, (6) setoff is not necessary to provide justice between these parties.

JUSTIN O'TOOLE LUCEY, P.A.

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