THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

RECEIVED
Jun 25 2020
SC Court of Appeals

Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated ..... Plaintiffs,

vs.

Island Pointe, LLC; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc; American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston; Andersen Windows, Inc; Atlantic Building Construction Services, Inc., n/k/a Atlantic Construction Services, Inc.; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc., f/k/a SGM Architects, Inc.; Tallent and Sons, Inc; W C Services, Inc.; CRG Engineering, Inc; CertainTeed Corporation; Kelly Flooring Products, Inc, d/b/a Carpet Baggers; Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Eloy Alonzo Vasquez; Chris a/k/a John Doe 61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall Company, Inc; Mosely Concrete; Hand A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A Construction, and Hand A Construction; JMC Construction, Inc; JMC Construction, LLC; John Does 1-15 ..... Defendants,

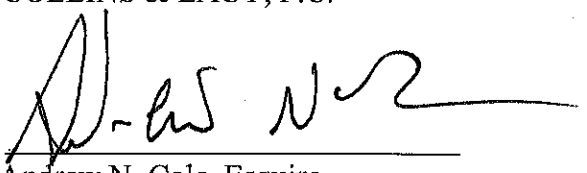
of which Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc. ..... Appellant.

INITIAL BRIEF OF APPELLANT

COLLINS & LACY, P.C.

By: 

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II. DID THE TRIAL COURT ERR WHEN IT FAILED TO SETOFF THE JURY VERDICT WITH THE SETTLEMENTS THAT WERE NOT REMOVED FROM THE TRIAL OF THIS CASE AS ISSUE RELEASE ITEMS?

STATEMENT OF THE CASE

On February 13, 2015, Respondents filed a construction defect lawsuit regarding a condominium project located on Peas Island, which is located near Folly Beach, Charleston County, South Carolina. The pleadings were revised several times and various defendants asserted crossclaims and third-party claims. The Respondents' amended complaint was filed November 4, 2016. The case was tried before the Honorable Jennifer B. McCoy from May 6 through 16, 2019. Respondents settled with various defendants other than Appellant Tri-County Roofing, Inc. ("TCR") before, during, and after the case was tried. Thirty-three of the thirty-six defendants named in the caption participated in the lawsuit at some time. There were eight defendants at the start of trial and five when the case went to the jury for deliberations. In their pleadings and at trial, Respondents sought damages for repair costs, lost use claimed during the future repairs, and punitive damages.

On May 16, 2019, the jury returned a general verdict of $6.5M actual damages against four of the five defendants remaining at trial: Complete Building Corporation, the general contractor (hereinafter "Complete"); TCR, a prime subcontractor to Complete for siding, roofing, and balcony waterproofing; Eloy Alonzo Vasquez, a sub-subcontractor for roofing and waterproofing (hereinafter "Vasquez"); Miracle Siding, LLC and Wilson

Lucas Sales d/b/a Miracle Siding, LLC, the sub-subcontractor that installed siding on seventeen of the twenty buildings (hereinafter "Miracle"); and W.C. Services, Inc., a prime subcontractor for fire sprinkler installation (hereinafter "W.C. Services"). The jury found Complete and TCR were grossly negligent and awarded $500k in punitive damages against them both. The trial judge submitted Complete's crossclaim for contractual indemnity to the jury. The jury awarded Complete $1,000 on its crossclaim against TCR. The jury returned a defense verdict in favor of W.C. Services on both Respondents' claims and Complete's crossclaims. After the initial jury verdict was returned, Vasquez and Miracle, which were found simply negligent, argued for a finding of their relative percentages of fault under Section 15-38-15 of the S.C. Contribution Among Tortfeasor's Act. The jury found that Vasquez and Miracle were each five percent (5.00%) responsible for the general verdict award.

The trial judge gave the parties ten (10) days to file their post-trial motions. After accounting for the weekend and holidays, TCR timely filed its post-trial motions on May 28, 2019. TCR was the only defendant that filed post-trial motions because Complete, Vasquez, and Miracle entered into post-verdict settlements with Respondents. The post-trial motion hearing was held on Friday, June 7, 2019 where Complete, Vasquez, and Miracle confirmed their settlements with Respondents and Complete withdrew its crossclaims against TCR. The trial judge subsequently issued a Form 4 Order denying TCR's post-trial motions on July 23, 2019, which also allocated a portion of the settlement setoffs and reduced the total general verdict amount against TCR from $7M (actual plus punitive damages) to $5.33M. On July 24, 2019, TCR received an electronic copy of the

filed verdict form, which was retroactively file stamped on May 16, 2019, the last day of trial.

TCR timely filed its motion to reconsider the Form 4 Order on August 5, 2019. Although TCR did not abandon any of its post-trial motions, TCR principally addressed setoff in its motion to reconsider. Respondents e-mailed a memorandum in opposition to the motion to reconsider on August 15, 2019.[1] TCR filed a return to Respondents memorandum on August 23, 2019. On September 25, 2019, the trial judge entered her final order denying TCR's motion to reconsider. TCR timely filed its notice of appeal with the South Carolina Court of Appeals on October 14, 2019, and served the notice on Respondents and the trial court on October 21, 2019. Although the notice of appeal addressed several issues, the only question TCR is prosecuting in this appeal is the trial court's inadequate setoff.

STANDARD OF REVIEW

"The right to setoff has existed at common law in South Carolina for over 100 years." Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (citation omitted). This right to setoff was first codified in 1988 as part of the South Carolina Contribution Among Tortfeasors Act. See Id. Section 15-38-50 of the South Carolina Code provides that "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) ... it reduces the claim against the others to the extent of any amount

[1] There is no record that Respondents' reply memorandum was filed with the court.

stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater...."

"[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes." Riley at 196, S.E.2d at 830 (citation and internal quotation omitted). "A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. SC Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing Welch v. Epstein, 342 S.C. 279, 312-313, 536 S.E.2d 408, 425 (Ct. App.2000)). "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." Id. "Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong." Id. (internal quotations omitted; citing Truesdale v. SC Hwy Dep't, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

> When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law. However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no set off as a matter of law. When the settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the claims.

Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018), reh'g den. (Dec. 13, 2018), cert.

granted (Aug. 6, 2019) (citations and internal quotations omitted). And when a plaintiff attempts to allocate the prior settlements, the court should review the allocation under the principles of equity. See eg. Rutland at 216, 734 S.E.2d at 145 (noting it was proper for the trial court to reallocate the proposed settlement allocation because there was no evidence of conscious pain and suffering, so all the settlement funds were reallocated by the court to the wrongful death claim).

Although not explicitly explained in the case law discussing setoff, the appellate courts analyze the setoff appeals under an abuse of discretion standard. Under this standard of review, the appellate court must give some deference to the ruling by the trial court. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). A lower court has abused its discretion when its ruling is either controlled by an error of law or based on a factual conclusion lacking evidentiary support. See Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013).

> An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006)(citations omitted).

FACTS

1. General Background

This is a construction defect lawsuit involving 40 duplex condominium units at a project called Palmetto Pointe at Peas Island, which is located near Folly Beach, Charleston

County, South Carolina (hereinafter the "Project").[2] The Project was constructed in 2006-2007 and received certificates of occupancy from January 19 through November 2, 2007. (RECORD CITE) Numerous parties were involved in the construction of Palmetto Pointe. In fact, thirty-six defendants were named in the caption, and thirty-three defendants participated in the litigation. Island Pointe, LLC (hereinafter "IP-LLC"), the developer, entered into an AIA contract dated December 27, 2005, with Complete, the general contractor, for the construction of the entire project, excluding the clubhouse. [RECORD CITE] The IP-LLC and Complete contract lists various duties and the scope of work of Complete, which includes oversight of the entire construction process, coordination of its subcontractor trades, coordination of the architects' plans and specifications that were given to the various subcontractors, plus other obligations and duties. [RECORD CITE] After twelve change orders, the total contract amount was $11,578,454. [RECORD CITE]

TCR entered into its subcontract with Complete on April 17, 2006 for the installation of the siding and roofs at the project. [RECORD SITE] The installation of the waterproof membranes on the decks was added by a change order. The total subcontract between Complete and TCR after change order number twelve was $1,382,558.24. [RECORD CITE] TCR in turn hired sub-subcontractors to complete its scope of work on the project including Vasquez (roofs and waterproof membranes), and Miracle (installed siding on seventeen of the twenty buildings in the lawsuit). [RECORD CITE] As with all

[2] The Project also includes a clubhouse and two additional duplex buildings. Only one of the defendants at trial -W.C. Services - acknowledges performing any work on the clubhouse. The two additional duplex buildings were constructed after the buildings in the lawsuit and by different contractors, so they were not joined into the litigation.

construction projects, the general contractor, architect, engineers, subcontractors, and material suppliers worked on the Project in some coordinated fashion.

> Q. When you were out there doing the work, were you out there by yourself just making stuff up, or were people assisting you?
>
> A. No. No. That, that, that wouldn't happen. Once again, there's, there's so many entities involved here with architects, engineers, people that are way smarter than me that -- I mean, we took our direction from, you know, what they wanted us to do.

(Trial Transcript, Week Two, p. 371, ll. 15-22.)

The architect and engineers on the project were involved throughout the entire construction process. The architect provided the plans and specifications, which set forth the entire design intent that Complete was charged with constructing.

> Q. Okay, and we talked a little bit about the role of the architect, and you've looked at the specifications already and you -- in response to Mr. Cole's questions, correct?
>
> A. Yes, sir.
>
> Q. And, and it was the architect in its specifications that determined the types of materials that the owner wanted on this project, correct?
>
> A. I would think so.
>
> Q. And, in fact, the architect specified in the case of the siding the size of the siding the owner wanted on this project, correct?
>
> A. I don't know. I was asked to submit two bids for it on two different sidings, so.
>
> Q. You were just shown by Mr. Cole the siding specification prepared by the architect, correct?
>
> A. That's correct.
>
> Q. An architect called for a 9 and a quarter inch ---

A. That is correct.

Q. --- siding?

A. He approved that.

Q. And that's what you installed?

A. That is correct.

(Trial Transcript, Week Two, p. 385, ll. 18-25, and p. 386, ll. 1-14.)

Q. Okay, and what exactly is a project manual?

A. The project manual lays out the specifications for the project, to include what products are to be used, size, all the different particulars so that we can give an adequate estimate on that project.

Q. Where does the project manual come from? Who, who puts it together?

A. This one looks like it came from SGM and was given to me by Complete Building.

Q. And who is SGM?

A. It's an architectural firm.

Q. Were they involved in the construction process?

A. Yes, sir, they were.

Q. Were they involved during construction as well?

A. Yes, sir.

(Trial Transcript, Week Two, p. 329, l. 22-25, p. 330, ll. 1-11.)

The architect addressed issues that came up during construction at regular meetings held at the job site.

A. ... A lot of times we had meetings with the GC, the architect, the engineer, all to collaborate on the project.

(Transcript, Week Two, p. 350, ll. 24-25.)

Q. And when the meetings were held, was there somebody that was in charge of them?

A. Yes, sir. Typically the GC. In this case Buddy Hilton oversaw, along with Gary Stanley, who was the project manager out there.

Q. Do you know how often you were out there at these meetings?

A. Sometimes weekly, sometimes every other week. It really just depended on what phase we're at in the project and how many buildings were going up and what different phases they were.

(Trial Transcript, Week Two, p. 351, ll. 22-25, p. 352 ll. 1-7.)

Respondents filed their original summons and complaint on February 13, 2015 alleging construction defects and praying for the common damages of repair costs plus lost use. [RECORD CITE] TCR brought third-party claims against its sub-subcontractors when it answered the original complaint on April 22, 2015. [RECORD CITE] Respondents amended their complaint on November 4, 2016 [RC] and filed a second amended complaint on November 2, 2017. [RC] The Respondents' amended their pleadings to add new defendants and bring direct claims against the third-party defendants. Despite the number of defendants and the causes of action alleged by the Respondents, the Respondents prayed for the same type of relief: repair costs, lost use, and punitive damages. Complete, IP-LLC, and Novus Architects, Inc. f/k/a SGM Architects, Inc. (hereinafter "Novus") filed crossclaims against the co-defendants generally alleging claims sounding in either contractual or equitable indemnity. [CITE]

2. The Parties at Trial

TCR was not the only defendant at trial and it is not the only party that took a judgment at trial. A number of defendants settled prior to trial. Eight defendants were still in the case when the trial started on May 6, 2019. [CITE] Five defendants were still in the case when it went to the jury for deliberations on May 16, 2019: Complete, TCR, Miracle, Vasquez, and W.C. Services. Complete, as the general contractor, was responsible for the entire project. Testimony was provided explaining the role of the general contractor on the job site and its responsibility to coordinate all of the trades as well as the architect and the engineers. [CITE] This testimony was supplemented by the language of the contract between IP-LLC and Complete for the construction of the project. [CITE]

TCR was the prime contractor for the siding, roofs, and waterproofing installed at the project. This work was done in coordination with and direction from Complete according to the drawings and specifications from the architect and the engineers. [CITE] TCR hired subcontractors that actually performed the siding, roofing and waterproofing scope of work. [CITE] Miracle installed siding. Vasquez installed the roofs and waterproofing. [CITE]

W.C. Services was hired by Complete and installed the fire sprinklers at the project.

3. The Trial

Trial started on May 6, 2019. The defendants present at the start of trial were Complete, TCR, Vasquez, Miracle, W.C. Services, Stanley's Vinyl Fence Designs (exterior railings) (hereinafter "Stanley's"), JMC Construction, Inc. and JMC Construction, LLC (repair contractor for a subcontractor that settled out before trial)

(hereinafter "JMC"), and IP-LLC (developer). Stanley's settled with Respondents on the second day of trial. JMC was dismissed by the trial judge on May 9, 2019 by directed verdict after Respondents rested their case. Respondents dismissed their claims against IP-LLC prior to the closing arguments. [CITE]

All of the parties at trial took care to clarify to the jury what claims and issues were still in the case. [CITE]

The parties also explained to the jury that certain items had been removed from the case and those previously resolved items were referenced as "issue releases". [CITE]

> Mr. Kendall: Your Honor, Rhett Hendall Again. We had one other motion that we had filed, and it mirrors what Mr. Lucey has already raised in terms of the issue of preclusion. So we have – we listed out the ones that we have. I think there is a little bit of difference from the list that he had: Andersen Products. Alderman on interior Handrail. ARS and all of its subcontractors on HVAC and electrical. Builder Services Group, DBA Gayle were fireplaces. And Kelly Flooring was a limited issue.
>
> And we probably ought to talk to each other in advance to made sure we don't step on each other. I think we probably have an agreement in spirit. We generally do. But we will get together and figure that one out.
>
> But I wanted to raise to the court that my list was just slightly different than the list that he had.
>
> The Court: Okay.
>
> Mr. Kendall: But and I hope we can work everything through.
>
> Mr. Lucey: Yes, Your Honor, if I may clarify the list for both of our benefits. As to Andersen Windows what is settled is any allegation of manufacturing defect. As to ARS and its subcontractors what is settled is any defect that is the sole liability of ARS and its electricians and its HVAC subs.

> The actual HVAC repair and electrical repair line – and the estimate is growing out the window. There is a semi-related HVAC related area which is that the framer didn't build access to the HVAC units. The framing issue is still in the case.

(Trial Transcript, Week One, pp. 112, ll. 9-25, p. 113, ll. 1-12.)

Although more causes of action were asserted in the pleadings, the only claims that went to the jury were Respondents' claims for (1) breach of warranty, (2) negligence, and (3) Complete's crossclaims for contractual indemnity. The damages Respondents sought were for the cost to repair alleged construction defects, lost use contemplated during the repairs, and punitive damages. (See, generally, pleadings and the jury verdict form.) In fact, these are the same injuries that Respondents sought redress in their original summons and complaint and throughout the entire litigation. [CITE]

The jury also heard testimony that some of the issues the jury was asked to deliberate over included work attributed to Complete and some subcontractors or other parties not actually in the courtroom. For example, the design and specifications from the architect were addressed.

> A. ...What is creating these very low slope areas is the meeting of different slopes that come together and they kind of cancel each other out, if you understand what I'm saying.
>
> Q. Yes.
>
> A. And it creates a spot that is just really flat.
>
> Q. So the idea though – because this is a very complicated roofline on these buildings, isn't it, where you have –
>
> A. It is very –
>
> Q. -- these lines that come together and do strange things?

A. It is very architectural, as I like to say.

Q. Right.

A. There are lots of places to it.

(Trial Transcript, Week One, pp. 434, l. 25, p. 435, ll. 1-11.)

The jury was also informed about various framing repairs that were necessary to be completed along with the repairs alleged against the parties at trial.

> Q. And you, you went and investigated four or five houses for deflections in the main floor you have in the foyer, correct?
>
> A. Floor slopes, yes.
>
> (Transcript, Week Two, p. 81, ll. 4-7.)
>
> Q. What would be the appropriate repair for the siding issue that was identified and talked about be?
>
> A. Sure. So it is a two-step process. The first step is the sheathing, underlying sheathing, appropriately nailed to the structure. So and there are -- there were requirements about a nailing pattern for that. That could be evaluated using engineering principles. Then assuming that the sheathing is adequately attached it would be possible to face nail the siding to the sheathing and into the studs and have it work.

(Trial Transcript, Week One, p. 759, ll. 24-25, p. 60, ll. 1-8.)

Respondents' cost estimator, Justin McCormick, issued his cost estimate dated December 21, 2017. [Ex.677;] [CITE] However, in contemplation of removing the issue release items, Mr. McCormick produced a revised estimate during the Respondents' case in chief that was dated May 7, 2019. Mr. McCormick's revised estimate was comprised of handwritten notes made directly onto his December 21, 2017 estimate. [CITE] Respondents presented the revised estimate to the jury through trial testimony. [CITE] In

order to cross-examine Mr. McCormick on his repair line items, Complete had the original cost estimate entered without objection as Exhibit 677 to the trial. [CITE] The revised estimate was not entered into the record.

Mr. McCormick's revised estimate removed the issue release items and added new figures for fire wall repairs plus an additional 10% contingency. The net change results in a reduction of Respondents' repair estimate from $15,257,512 to $13,428,826. [CITE]

It was clear from the arguments from Respondents and defense counsel as well as the testimony from Mr. McCormick that the jury was *not* to consider the line items referencing the Clubhouse; section 1738.010 for the removal of the windows and doors [I.p.611; II.p.739]; section 1739.010 for the demolition of the floors [I.p.609; II.p.739]; section 2620.010 regarding drainage issues [I.p.613; II.p.740]; section 2900.010 regarding landscaping and irrigation repairs [II.p.740]; section 3310.210 regarding concrete repairs [I.p.609; II.p.740]; section 6160.010 regarding subfloor repairs [I.p.610; II.p.740]; section 6430.010 regarding interior stairway repairs [I.p.610; II.p.740]; section 6430.010 regarding interior stair railing repairs [I.p.612; II.p.740]; section 6450.010 regarding interior shoe molding replacement [I.p.612; II.p.740]; section 6452.010 regarding interior wood casing around the windows replacement [I.p.612; II.p.740]; section 8550.010 regarding the window product replacement [I.p.610-611; II.p.741]; section 9133.010 regarding sheetrock repairs for HVAC repairs and window replacement [I.p.614-615; II.p.741]; sections 9310.010, 9640.010, and 9680.010 for the replacement of interior floor tile, hardwood, and carpets [II.p.741]; section 15400.000 regarding plumbing work associated with replacing the floors [II.p.741]; section 15700.000 regarding HVAC repairs [II.p.741]; and section

16500.010 regarding electrical work [II.p.741]. These were the line items from Mr. McCormick's cost estimate associated with the issue releases. All of the other line items and claimed damages Respondents were seeking were presented to the jury through testimony or by inclusion of Mr. McCormick's cost estimate.

Although Mr. McCormick had reduced his original cost estimate of $15,257,512 to $13,428,826 at trial, counsel during Respondents' closing arguments told the jury they took out the Clubhouse numbers and added a lost use figure and specifically asked the jury for actual damages in the amount of $12.8M. [CITE] When the jury started its deliberations, Respondents had already received settlements for the settlements labeled as issue release, for other settlements, and for funds from a covenant not to execute favoring Complete totaling $5,012,500.

Before the case was sent to the jury, Respondents, Complete, TCR, Vasquez, Miracle, and W.C. Services debated the format of the jury verdict form. [CITE] Generally, the defendants all advocated for a version of the jury form that asked the jury to allocate liability among each of the defendants. [CITE] Respondents submitted a jury verdict form that made no such allocations and had a single line for the jury to fill in a general verdict number that combined the causes of action for breach of warranty and negligence. [CITE] The Trial Court used the Respondents' version of the jury verdict form with slight edits.

The jury returned its verdict on May 16, 2019. The jury found the total construction defect/repair damages that were presented at trial were valued at $6.5M. The jury found Complete and TCR were both grossly negligent and awarded $500k in punitive damages against both. [CITE] The trial judge had submitted Complete's crossclaim for contractual

indemnity to the jury. The jury awarded Complete $1,000 for its crossclaim against TCR. The jury returned a defense verdict in favor of W.C. Services. [CITE] Vasquez and Miracle were found only simply negligent; therefore, a supplemental post-trial argument to the jury was conducted pursuant to § 15-38-15 of the South Carolina Contribution Among Tortfeasors Act. [CITE] Complete and TCR did not participate in this post-verdict allocation hearing because they were found jointly and grossly negligent. The jury found that Vasquez and Miracle were both deemed five percent (5.00%) responsible for the total damages.

4. The Settlements

Prior to the start of trial, Respondents received $4,937,500 dollars in settlements. [CITE] This figure includes $1M from a covenant not to execute favoring Complete that was paid by one of Complete's insurance carriers. [CITE] Some of the pre-suit settlements were clearly designated by the parties at trial as issue releases. [CITE] The agreed issue released settlements include the repairs associated with the HVAC,[3] fireplaces,[4] grading

[3] American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston and its various sub-subcontractors, Victor Hugo Hernandez and Hernandez Electric, LLC, Liliana Rojas Flores, Martin Barr d/b/a Port City Structured Wiring, Keller Electric, LLC, John Toolin d/b/a John F. Toolin Heat and Air, Russell "Rusty" Hill d/b/a Rusty's Heating & Air, and Warren Anderson, all contributed to a total settlement of $795,000 that was entered around April 23, 2019. [CITE]

[4] Although the fireplace issue was not explicitly referenced as an issue release during trial, Complete noted in its Motion in Limine to Exclude Evidence Related to Released Claims [CITE] that the $22,500 settlement reached with Building Services Group, Inc. d/b/a Gale Contractor Services around July 24, 2018 was an issue release. [CITE]Because of this pre-trial filing, TCR now concedes that the fireplace settlement was considered an issue release.

and paving,[5] interior flooring,[6] interior trim and interior railings[7], concrete,[8] and the window product. These conceded issue release settlements total $1,907,500.

Respondents received settlements prior to trial that were not designated as issue releases, including a covenant not to execute for Complete,[9] and repairs for painting and caulking,[10] framing,[11] siding,[12] exterior residential railings,[13] insulation and drywall,[14] and from the architect,[15] and from the asphalt shingle and siding manufacturer.[16] These non-issue release settlements total $2,609.000.

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[5] Tallent and Sons, Inc. settled with Respondents for $195,000 around February 2, 2019.[CITE]
[6] Kelly Flooring Products, Inc. d/b/a Carpet Baggers settled with Respondents for $25,000 around January 25, 2019.[CITE]
[7] Alderman Construction settled with Respondents for $75,000 around June 19, 2018.[CITE]
[8] Mosley Concrete settled with Respondents for $95,000 around April 29, 2019.[CITE]
[9] One of Complete's carriers agreed to pay its $1M limits for a covenant not to execute, which covenant was entered around July 10, 2018. [CITE] Respondents' treatment of this $1M is inconsistent as Plaintiff argued to the trial court that the covenant not to execute should not be considered a settlement and the first time that any settlement funds paid on behalf of Complete were attempted to be allocated were in a June 6, 2019 settlement agreement with Complete. [CITE]
[10] Creekside, Inc. settled with Respondents for $150,000 around June 6, 2019. [CITE]
[11] Atlantic Building Construction, Services, Inc. n/k/a Atlantic Construction Services, Inc. settled with Respondents for $700,000 around April 5, 2019. [CITE] H and A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A Construction, and H and A Construction settled with Respondents for $500,000 around January 31, 2018. [CITE]
[12] Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction, which installed the siding on a few of the units at the project, settled with Respondents for $150,000 around April 25, 2018. [CITE]
[13] Stanley's Vinyl Fence Designs settled with the Respondents on the second day of trial for $295,000 on May 8, 2019.
[14] Cohen's Drywall settled with Respondents for $125,000 around July 12, 2018. [CITE]
[15] Novus Architects, Inc. f/k/a SGM Architects, Inc. settled with Respondents for $650,000 around February 22, 2018. [CITE]
[16] CertainTeed Corporation, a product manufacturer, settled with Respondents for $35,000 around July 12, 2018.[CITE]

Complete, Vasquez, and Miracle settled after the jury rendered its general verdict on May 16, 2019. These post-verdict settlements total $2,787,500. The funds from the covenant not to execute favoring Complete should be included here because the final settlement agreement with Complete was entered on June 6, 2019, twenty-one days after the trial. These post-verdict settlements were deemed entered after the jury's joint and several verdict was entered against Complete, Vasquez, TCR, and Miracle.

5. Post-Verdict Proceedings

TCR was required to file a motion to compel Respondents to produce copies of the settlement agreements reached in this case. [CITE] See Huck v. Oakland Wings, LLC, 422 S.C. 430, 813 S.E.2d 288 (Ct. App. 2018), reh'g den. (March 28, 2018), cert. den. (Aug. 3, 2018) (finding that settlement agreements are relevant and must be produced after a verdict is reached). Respondents eventually produced the settlement agreements the day before the post-trial motions hearing on June 6, 2019. Respondents filed general dismissals of the claims against the parties that settled. [CITE] No dismissal filings attempted to allocate the settlement funds. Respondents entered into separate settlement agreements. [CITE] The settlement agreement signed by Respondents and Complete on June 6, 2019, the day before the post-trial motions hearing on a Friday, is the only settlement agreement that includes language purporting to allocate any settlement funds paid by to Respondents in this case. The June 6th agreement includes the settlement proceeds from the execution of a covenant not to execute favoring Complete. [CITE]

The trial judge heard the post-trial motions on June 7, 2019. The principal arguments at the post-trial motions hearing were regarding the issue of setoff. This hearing

was held on a Friday. At this hearing, Respondents conceded only $630,000 of all settlements were subject to setoff. [CITE] Respondents did not even acknowledge setoff of the post-verdict settlements from TCR's subcontractors, Vasquez and Miracle! [CITE] Respondents e-mailed the trial judge with a modified setoff allocation on the Monday following the motions hearing. The trial judge issued her Form 4 order regarding the post-trial motions on July 23, 2019 which awarded setoff in the amount of $1,670,000 and ordered a revised judgment against TCR in the amount of $5,330,000. On July 24, 2019, TCR received an electronic copy of the filed verdict form and judgment, which was retroactively file stamped on May 16, 2016, the last day of trial. [CITE] TCR timely filed a motion to reconsider on August 5, 2019. Respondents e-mailed a memorandum in opposition to TCR's motion to reconsider dated August 15, 2019.[17] TCR filed a return to Respondents' memorandum on August 26, 2019. The trial judge denied the motion to reconsider in a final order filed September 25, 2019. This appeal followed.

ARGUMENTS

TCR is entitled to complete setoff of the jury verdict by the settlements reached in this case that were not otherwise removed from review by the jury and designated as issue releases.

I. TCR is entitled to setoff of all post-verdict settlements.

TCR was not the only defendant at trial and it is not the only party that took a judgment at trial. At the end of the second week of trial, the jury provided a general verdict

[17] TCR sees no indication that this memorandum was actually filed with the Charleston County Clerk of Court.

against Complete, TCR, Miracle, and Vasquez. The jury did not find W.C. Services liable for the damages claimed against it and awarded it a defense verdict. JMC was dismissed by directed verdict at the close of Respondents' case. Stanley's settled during trial. Respondents acknowledge that TCR is entitled to setoff of the exterior railing settlement from Stanley's. Respondents eventually conceded that TCR is entitled to a setoff of the post-verdict settlements from TCR's own subcontractors, Vasquez and Miracle. However, Respondents only concede a small portion of the post-verdict settlements from Complete should be setoff. TCR submits that it should receive full setoff credit for the post-verdict settlements by Complete, including the $1M paid on behalf of Complete for the covenant not to execute, which was included in the settlement agreement with Complete. See Smalls v. S.C. Dept of Ed., 339 S.C. 208, 221, 528 S.E.2d 682, 688 (Ct. App. 2000).

The verdict in the amount of $6.5M is dated June 16, 2019 - the last day of trial. Despite any arguments to the contrary, the jury rendered the decision on the items presented to the jury and found the total actual damages for Respondents' claims is $6.5M. There is no need to parse out which items are characterized as issue releases for the post-verdict settlements because Complete, TCR, Vasquez, Miracle, W.C. Services, Stanley's, and JMC were actually at the trial. "Because a verdict is deemed to be the full measure of the plaintiff's loss, then a verdict plus a settlement would be more than full recovery. Hence, the result is the allowance of a setoff to the non-settling defendant against his verdict." James L. Ward, Jr. and Edward J. Westbrook, South Carolina Damages, Second Edition (S.C. Bar 2009).

Respondents' attempt to allocate the post-verdict settlement by Complete is improper. Moreover, the attempt to allocate the post-verdict settlement by Complete is untimely. The general verdict amounts entered against Complete, TCR, Vasquez, and Miracle were set by court order effective May 16, 2019. [CITE] The first reference to any attempt by Respondents to allocate any settlements was in the settlement agreement with Complete that was executed on June 6, 2019 - twenty-one days after the jury rendered its verdict. In fact, the June 6th settlement agreement with Complete is the only settlement agreement that references any attempt by Respondents to allocate the settlement proceeds they received. [CITE] Respondents provided no notice to the trial judge or to the other parties how they would attempt to allocate the settlement funds until after the jury returned its verdict against Complete, TCR, Vasquez, and Miracle. "[B]efore 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, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 471-472, 724 S.E.2d 188, 190 (Ct. App. 2012) (citing Hawkins v. Pathology Assocs. of Greenville P.A., 330 SC 91, 113, 498 S.E.2d 395, 406-407 (Ct. App. 1998). In the instant case, Complete entered into its settlement agreement after the jury rendered its verdict and after the judgment was filed. The Complete settlement agreement also incorporated the funds from the covenant not to execute. Therefore, Complete's settlements are in actuality partial satisfactions of a judgment. The verdict must be reduced by the post-verdict settlements, to do otherwise would be wholly prejudicial and inequitable. Such a procedure advocated by Respondents would allow double recovery

because they could recover part of a judgment from one defendant and call it a settlement, and then later execute the entirety of the judgment against another defendant.

"When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." Stoneledge, 425 S.C. at 301, 821 S.E.2d at 522 (citing Widener, 397 S.C. at 473, 724 S.E.2d at 191 (Ct. App. 2012)). "Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong." Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (internal quotations omitted; citing Truesdale, 264 S.C. at 235, 213 S.E.2d at 746 (overruled on other grounds by McCall, supra). Moreover, the actual damages awarded by the jury are to compensate the plaintiff and not to serve as additional punishment against the defendant. See Rutland at 217, 734 S.E.2d at 146 (citing 22 Am. Jur.2nd Damages §27 and Haselden v. Davis, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2003) for the proposition that "[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.... [and w]here allocation of damages furthers that policy, we do not believe the result is inequitable.")

The jury determined that Complete, the general contractor in charge of the entire construction site, and TCR, the prime subcontractor for the siding, roofing, and deck waterproofing, were jointly responsible for the entire actual damages-general verdict in the amount of $6.5M. Stated another way, although the Respondents asked the jury for $12.8M to compensate them for all items still presented at trial, the jury found that after the issue released items were removed, Respondents' repair cost and lost use damages were

valued at $6.5M. If Complete was the sole non-settled defendant, then Respondents would have to concede setoff of all settlements that were not otherwise removed from deliberation as issue releases. There is no reasonable argument to deny TCR a setoff of the entire settlement that Complete paid to Respondents when no attempted allocation was submitted before the jury verdict and because TCR was deemed jointly responsible for the judgment under the general verdict.

TCR acknowledges that on the night before the post-trial motions hearing Respondents produced copies of the settlement agreements it had entered with the various settled parties. [CITE] These settlement agreements generally acknowledge that Complete is entitled to setoffs. However, these settlement agreements do not state that the settlements are for anything other than the resolution of Respondents' claims seeking reimbursement for the cost of repair and for lost use. Because of the joint and several verdict against Complete and TCR, TCR is now responsible for all of the damages that Complete was responsible for, including damages resulting from Complete's management and oversight of the entire project, addressing framing repairs of the sheathing and porch joists, repairing the exterior railings and wood columns, repairing all of the fireproofing and fire wall deficiencies, repainting, and repairing the siding, roofing, and deck waterproofing. [CITE] TCR is now deemed responsible for more than its actual scope of work on the Project because of the general verdict entered by the jury.

TCR and the other defendants at trial submitted proposed jury verdict forms that would have allowed the jury to separate out which components of repair were properly associated with a defendants' scope of work. Respondents insisted on a general verdict

damages number. While Complete was responsible for the entire project, it is fundamentally unfair, for example, for TCR to be responsible for repairing the firewall and fireproofing deficiencies arguably attributable to W.C. Services and Complete as it would be unfair for W.C. Services to be responsible for the alleged siding deficiencies. However, by not giving setoff for the Complete settlements, TCR is now deemed responsible for more damages than TCR's original scope of work. Respondents' post-verdict allocation made on June 6, 2019 is not actually a settlement allocation, but it is an attempt to invade and interpret the general jury verdict that was rendered on May 16, 2019. Our courts have long held that it is improper for the court to invade the province of the jury. See, e.g., Kennedy v. Richland Cty. Sch. Dist. Two, 428 S.C. 98, 119, 833 S.E.2d 414, 425 (Ct. App. 2019), reh'g denied (Oct. 24, 2019), cert. dismissed (Mar. 9, 2020) (when entertaining a motion for a new trial *nisi*, there must be "compelling reasons to justify invading the province of the jury."); Stanton v. Southern Ry. Co., 56 S.C. 398, 34 S.E. 695 (1900) (noting it would be improper for the trial judge to interject his opinions into the jury charge as this would invade the province of the jury). It is the court's duty to enforce a verdict, not make it. Stoneledge, 425 S.C. at 302, 821 S.E.2d at 522 (citing Joiner v. Bevier, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930)). But it is also incumbent on the court to apply the statutory mandated setoff post-verdict because setoff is not a matter properly triable to the jury. Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995).

According to Respondents' post-verdict allocation of the Complete settlement, the repairs that Complete defended at trial were claims regarding the exterior railings, fire separation walls and other issues related to W.C. Services' work, framing repairs, and

punitive damages. [CITE] All the damages Respondents' sought in this construction defect litigation are to recover for the common injury relating to the cost to repair, lost use, and punitive damages. See Widener, supra. (noting that setoff is proper between actual and punitive damages because the damages arise out of the same type of injury); accord Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20, 29 (Dist. Ct. App. Fla. 1997), reh'g den. (March 11, 1998) (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because "the damages were not separate and distinct" and the setoff prevents a double recovery for the plaintiff). Respondents' received a general verdict in their favor, and it would be improper and inequitable for the Respondents to now reinterpret the jury's verdict under the disguise of a setoff allocation. Respondents are only entitled to one recovery for their injury. See Huck, 422 S.C. at 437, 813 S.E.2d at 291 ("In other words, there can be only one satisfaction for an injury or wrong."); Rutland, 400 S.C. at 216-217, 734 S.E.2d at 145-146 (noting that a setoff prevents a person from obtaining a double recovery since "[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor."); Truesdale, 264 S.C. at 235, 213 S.E.2d at 746 ("[I]t is almost universally held that there can be only one satisfaction for an injury or wrong.").

TCR was not the only defendant at trial and it is not the only party that took a judgment at the trial. TCR is entitled to a setoff of all post-verdict settlements, which includes the full settlements paid by Complete, the settlements by Vasquez and Miracle, and any future post-verdict settlements, if any, by any other parties that were joined in the litigation. Respondents' already concede that the settlement funds from Stanley's,

Vasquez, and Miracle - three of the parties at trial - properly setoff the general jury verdict. There is no rational basis to treat the post-verdict settlement executed by Complete on June 6, 2019 differently. TCR is entitled to setoff in the amount of $3,082,500 for the post-trial and during trial settlements.[18] "Where reallocation of damages furthers th[e] policy [that compensatory damages are intended to make a plaintiff whole, not to punish the tortfeasor], we do not believe the result is inequitable." Rutland at 217, 734 S.E.2d at 146.

II. TCR is entitled to setoff of all the settlements that were not otherwise removed from the trial of this case and designated as issue releases.

A plaintiff is only entitled to recover once for their injuries. The law prevents a plaintiff from receiving a double recovery by applying setoff. See Welch, 342 S.C. at 312, 536 S.E.2d at 425 ("In other words, there can only be one satisfaction for an injury or wrong."); Rutland, 400 S.C. at 216, 734 S.E.2d at 145 ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action."); Riley, 414 S.C. at 195, 777 S.E.2d at 830 ("[I]t is almost universally held that there can be only one satisfaction for an injury or wrong."); Hawkins, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles."). "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." Welch at 313, 536 S.E.2d at 425. The common law regarding setoff was codified in 1988. See Riley at 195, 777 S.E.2d at 830. "[I]n the

[18] This total includes $2,137,500 from Complete, $295,000 from Stanley's, $325,000 from Miracle, and $325,000 from Vasquez.

absence of bad faith, the function of the trial court is limited to applying the settlement credit pursuant to § 15-38-50." Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App. 1999). "[T]he [South Carolina Contribution Among Tortfeasors] Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" Riley at 196, 777 S.E.2d 830 (quoting Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010)).

In the first complaint filed in this case, Respondents sought damages to repair the Project and to reimburse the Plaintiffs for any lost use they may suffer while the repairs are performed. [CITE] Respondents sought these same damages when they asked the jury to return a general verdict at trial for their alleged cost of repair plus lost use damages. The names of the legal theories asserted by Respondents do not control whether setoff should be applied when the claimed damages are the same and they arise from the same factual scenario. See Widener, 468 S.C. at 472, 724 S.E.2d at 190 (finding a claim against a employee benefits provider was for the same injury for the damages sought against beneficiaries charged with improperly removing funds from the employee benefits account, thus setoff was applied); Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 209-210, 662 S.E.2d 444, 451 (Ct. App. 2008), reh'g den. (June 26, 2008) (noting that setoff was proper for causes of action for aiding and abetting a breach of fiduciary duty and tortious interference with contract because the damages "arose out of the same factual scenario."); Ellis, 335 S.C. at 113, 515 S.E.2d 268 at 272 (pointing out the claims against Richland Memorial and Dr. Oliver "arouse out of the same factual scenario" and that the

plaintiff "confuse[d] the concept of damages within the meaning of the word injury as used in [S.C. Code § 15-38-50].". The injury contemplated in the setoff statute "is broad enough to include all damages." Ellis at 113, 515 S.E.2d at 272. In fact, Respondents specifically requested the jury issue a single damages number on the jury verdict form.

In this case, Respondents sought damages to repair the Project and for lost use. The trial judge informed the jury that the damages being sought by Respondents was for the cost of repairs plus lost use, and the trial judge assured the jury that she would act as the gatekeeper to ensure that the Plaintiffs would not receive multiple recoveries for the same damages.

> With regard to cost of repair, the plaintiffs are not required to prove that the repairs have actually been made. A competent estimate of the cost of repairs is sufficient to create a factual issue for you to determine damages.
>
> With regard to loss of use, if you find that the plaintiff was or will be unable to use its property for a period of time because of a defendant's wrongful conduct, you should award the plaintiff compensation for the loss of use only if you believe the loss of use was proximately caused by a defendant's conduct.
>
> ***
>
> The cost of repair or restoration is a valid measure of damages for injury to a building. When determining the amount of damages, if any, you may consider a competent estimate of the cost to repair to a building.
>
> ***
>
> If you find that the plaintiff proved its right to recover on multiple causes of action, then plaintiff is entitled to receive a full set of damages on each individual cause of action so proven. The trial judge will ensure the plaintiff does not receive a double recovery. In other words, although plaintiff is entitled to receive a full set of damages for each individual claim, a plaintiff will only recover once.

(See Trial Transcript Week Two, p.815, ll.8-17; p.816, ll.9-12; and p.816, l.23 - p.817, l. 5.)

Generally, damages in construction defect cases like the Palmetto Pointe litigation all arise out of the same set of facts or type of injury. See Widener, supra. (noting that setoff is proper between actual and punitive damages because the damages arise out of the same type of injury); accord Centex-Rooney, supra (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because "the damages were not separate and distinct" and the setoff prevents a double recovery for the plaintiff). The confusion regarding whether the injury and claim in a construction defect lawsuit are similar and therefore subject to setoff appears to derive from the fact that the seminal cases discussing setoff in South Carolina involve claims for wrongful death and survivorship.

Wrongful death and survivorship claims in South Carolina are created by statute. There is no question that these are distinct claims that seek separate forms of damages. A wrongful death claim is brought by the beneficiaries of the decedent to compensate for their own losses. "In a wrongful death action in South Carolina, the damages recoverable by the statutory beneficiaries of the decedent include (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society." Boyle v. U.S., 948 F.Supp.2d 577, 580 (D.S.C. 2012) (citing Knoke v. South Carolina Dept. of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996)). "In a wrongful death case, the question of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." Id.

(citing Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989)). "In a survival action, the legal representative of the deceased may recover damages for the deceased's conscious pain and suffering and medical expenses." Boyle at 580 (citing Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990)).

In the cases discussing setoff and the allocation of damages between claims for wrongful death and survivorship, the analysis turns on whether there was sufficient information in the record regarding the decedent's pain and suffering to support an allocation proposed by the plaintiffs. The appellate courts have overturned allocations where no evidence of pain and suffering was presented giving no justification to apply any portion of the settlement to the wrongful death claim (see Rutland, supra.) and the courts have upheld allocations where there was some evidence to support the proposed allocation (see Riley, supra.). Claims other than wrongful death and survivorship claims do not share this same distinction. See, e.g., Widener, supra.; Vortex, supra.; Ellis, supra.

Throughout the trial and during the closing arguments in the present Palmetto Pointe case, the parties asked the jury to evaluate the damages presented at trial and to ignore the items specifically designated as issue releases. [CITE] Again, the issue releases explained to the jury included the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products. [CITE] Whatever was not explicitly removed from the trial was still presented to the jury through witness testimony and trial exhibits. Every item not designated as an issue release was included in the trial since Complete, the general contractor responsible for the entire construction project, was present during the whole trial.

The construction of the Palmetto Pointe Project was not completed in a bubble. The jury heard testimony regarding all the different parties that worked together to construct the Project. The trial court properly allowed testimony that the architect provided the plans and specifications at issue with the construction, [CITE] that certain engineers were involved with the design and product selection process [CITE], that the manufacturer of the siding and waterproofing inspected the installation of their respective products [CITE], and that the framers were responsible for installing the roof and deck slopes on the project. [CITE] These so called "empty chair defendants" are allowed because they are not placed on the jury verdict form. See Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). There is no allocation to the empty chair defendants, but the parties at trial are not without a remedy in the post-trial procedures because the court may apportion liability among the parties at trial pursuant to S.C. Code § 15-78-100 and "any respondent found liable will be entitled to an equitable set-off against the settlements... already received." Chester, 388 S.C. at 346, 698 S.E.2d at 560.

The defendants objected to Plaintiffs' proposed jury verdict form that lumped all of the issues at trial into a single, general verdict figure. Although the parties worked together to construct the Project, some scopes of work can be distinguished. For example, if the jury was allowed to allocate responsibility between the parties at trial, then the firestopping issues alleged against W.C. Services and Complete would not now be attributable to TCR as part of the general verdict. It is improper for the Plaintiffs now to attempt to dissect which claims at trial should be allocated out of the general jury verdict via arbitrary allocations.

It is established law that Respondents here are not entitled to multiple awards for the same injury. See Welch, 342 S.C. at 312, 536 S.E.2d at 425 (Ct. App. 2000) ("In other words, there can only be one satisfaction for an injury or wrong."); Rutland, 400 S.C. at 216, 734 S.E.2d at 145 ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action."); Riley, 414 S.C. at 195, 777 S.E.2d at 830 ("[I]t is almost universally held that there can be only one satisfaction for an injury or wrong."); Hawkins, 330 S.C. at 113, 498 S.E.2d at 406 ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settles."). On the other hand, TCR is not seeking to get credit for the items labeled as issue releases twice. TCR concedes that it, as well as Complete, Miracle, Vasquez, and W.C. Services, received the benefit of a lower trial demand when the items labeled as issue releases were taken out of Respondents' repair cost estimate. See The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh'g den. (Oct. 19, 2017).

The Oaks is a construction defect case that was tried against various construction parties including the developer and the construction manager. Prior to the scheduled trial date, several settlements were entered. The developer and construction manager were granted a partial release by the POA and they signed the settlement documents that set forth which claims were dismissed with prejudice and which claims remained. The Oaks court makes clear that the settlement agreement reserved the question of whether the developer construction manager would receive any credits from the settlement, which "will be determined by the court consistent with South Carolina Law." Id. at 433, 803 S.E.2d at

481. The jury awarded a judgment against the appellants and the appellants moved for allocation of the damages and setoff. The court disagreed and found that the appellants had "already received the benefit of the settlements" because the amount of damages the plaintiff presented at trial had removed the items from the settlements that were paid. See Id. at 442, 803 S.E.2d at 484. The Oaks court noted that the POA's total repair estimate prior to trial was approximately $13M but the POA only asked for approximately $9M in damages at trial. The difference in the pre-trial repair estimate and the damages requested at trial was calculated by the POA having "removed from their claim the repairs necessitated by the damage cause by the window installation." Id.

In the present Palmetto Pointe case, Respondents' cost estimator, Mr. Handegan, testified that he modified his original repair cost estimate by subtracting out the issue releases and then adding in additional fire wall and fire sprinkler damages. [CITE] The Respondents' original repair cost estimate was $15,257,512. [CITE] The revised repair cost estimate at trial was $13,428,826. [CITE] The issue releases thus reduced the Respondents' repair cost demand by $1,828,686. In his closing arguments, counsel for the Respondents restated the amount of Mr. Handegan's revised estimate total and then he told the jury he was taking out the clubhouse damages and the window product issues, adding in lost use damages, and made a revised request to the jury to award actual damages of $12.8M. Stated another way, Respondents claimed at trial that their total damages when the issue released items were taken out was $12.8M.

TCR is not asking for a setoff of the issue release settlements for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the

window products that reduced Respondents' original cost estimate to their demand of $12.8M at trial. TCR is asking for a setoff of all of the claims *other than the issue releases*. The trial court erred when it failed to properly set off the remaining items not designated as issue releases by the parties. See Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) (since "one tortfeasor is entitled to credit for the amount paid by another tortfeasor, the amount of setoff is the amount actually paid rather than the lifetime value of a structured settlement."); Widener, 397 S.C. at 473, 724 S.E.2d at 191 (noting "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)."); Smalls, 339 S.C. at 219, 528 S.E.2d at 688 (As a general rule, "[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles."); Lloyd's, Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (the amount of the damages recoverable against the non-settling tortfeasor is reduced by the total amount of consideration paid for a release of a joint tortfeasor); Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) ("Under South Carolina law, a non-settling defendant is entitled to a pro tanto reduction of a judgment in a same cause of action.").

At the time of the post-trial motions hearing, Respondents had received total settlements in the amount of $6.8M. The settlements that all parties agree were for the issue released items for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products total $1,907,500. Subtracting this figure from Respondents' original repair estimate yields $13,250,012, which figure is close to Mr. Handegan's revised estimate dated May 7, 2019 of

$13,428,826. TCR acknowledges that the issue released items for the HVAC, grading and paving, fireplaces, interior flooring, interior trim and interior railings, concrete, and the window products are incorporated into the Respondents' revised trial demand. Prior to trial, Respondents had received settlements of $3,717,500 or $4,717,500, depending on whether the funds from the covenant not to execute befitting Complete are referenced pre-trial or as part of the settlement agreement that was entered on June 6, 2019, twenty-one days after the jury returned its trial verdict. If all the pre-trial settlements were in fact removed from the trial as Respondents apparently advocate now, then Mr. Hendegan's revised estimate at trial should have been either $8,632,512 or $9,632,512, depending on whether the funds from the covenant not to execute are included. Respondents' position guarantees that they will receive double recovery on the items that were not removed from the case as issue releases. The trial judge abused her discretion when she failed to act as the gatekeeper to prevent such a double recovery. "Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor." Rutland, 400 S.C. at 217, 734 S.E.2d at 146. Respondents are made whole when the proper setoffs are applied. TCR's requested setoff allocation is the mandated statutory and common law result that furthers the policy to avoid double recovery to the Plaintiff and lead to an equitable result. See Id.

CONCLUSION

The trial judge abused her discretion and committed an error of law by failing to allocate the full amount of setoff available in this case. TCR does not seek setoff of the items that all parties agreed were issue releasees and where the jury was specifically informed that they were not to include as damages at trial. All settlements paid by the

defendants who were at the trial of this case should reduce the final jury verdict as setoffs. This includes the Stanley's settlement of $295,000 already conceded by Respondents. Once the jury rendered its verdict against the parties at trial, the damages were set, and any post-verdict settlements merely reduce the amount of the verdict. Thus, the post-verdict settlements by Complete for $2,137,000, by Miracle for $325,000, and by Vasquez for $325,000 should reduce the general jury verdict.

Respondents incorporated all claims that were not otherwise removed as issue releases in their case against the parties at trial. This included the claims against Complete, the general contractor. By the gross negligence/joint and several verdict entered against Complete and TCR, TCR is deemed responsible for all the issues that Respondents sought against the general contractor, whether the claims relate to TCR's actual scope of work on the Project or not. The damages sought in this construction defect action are common and arise out of the same facts and are subject to setoff. This is why TCR also requests full credit and setoffs for prior settlements that were not designated as issue releases. The general jury verdict should be reduced further by the $150,000 settlement paid by Creekside for painting and caulking (Respondents concede this full amount as setoff); by the $700,000 settlement paid by Atlantic Building for framing; by the $500,000 settlement paid by H and A Framing, Atlantic Building's subcontractor; by the $650,000 settlement paid by Novus Architects for its architectural design and specifications for the Project; by the $35,000 settlement paid by Certainteed, the siding and roofing product supplier (Respondents concede this full amount as setoff); by the $150,000 settlement paid by Cornerstone Construction for siding installation on three buildings (Respondents concede

this full amount as setoff); and by the $125,000 settlement paid by Cohen's Drywall for insulation and drywall. The total setoffs not designated as issue releases and already accounted for at trial add up to $4,892,500.

The appellate court should remand this case to the trial court with direction to properly account for the settlements available for setoff. With the information currently available, the general verdict amount should be reduced to reflect a final judgment against TCR of $2,107,500.

Respectfully submitted

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June 25, 2019

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

RECEIVED
Jun 25 2020
SC Court of Appeals

Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. And Jack Love, Individually, and on behalf of all others similarly situated, ...Plaintiffs,

vs.

Island Pointe, LLC; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc; American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston; Andersen Windows, Inc; Atlantic Building Construction Services, Inc., n/k/a Atlantic Construction Services, Inc.; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc., f/k/a SGM Architects, Inc.; Tallent and Sons, Inc; W C Services, Inc.; CRG Engineering, Inc; CertainTeed Corporation; Kelly Flooring Products, Inc, d/b/a Carpet Baggers; Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; Chris a/k/a John Doe 61; Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall Company, Inc; Mosely Concrete; Hand A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a H and A Framing, LLC, H&A Construction, and Hand A Construction; JMC Construction, Inc; JMC Construction, LLC; John Doe 1—15, ... Defendants,

of which Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc. .....Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter by email and by depositing a copy of it in the United States Mail, postage prepaid, on June 25, 2020, addressed as follows:

June 25, 2020

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