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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001790

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

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; 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 and John Doe 1-60, ... 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.

RESPONDENTS' (PROVISIONAL) INITIAL BRIEF/*

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/* Provisionally filed as Appellant's Motion to Supplement remains pending

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1) **Has TCR met its burden to establish that the trial court abused its discretion in conducting its setoff analysis?**

2) **Has TCR met its burden that it is entitled to additional setoff?**

SUMMARY OF ARGUMENT

TCR has already effectively received a triple setoff. First, the Association reduced its original damages at trial and only asked the jury for compensation related to defects and damages resulting from work performed by the Defendants remaining at the time of trial. Second, the jury effectuated a setoff when, at the Defendants' urging, it awarded Plaintiffs a further reduced amount for damages presented at trial arguably due, at least in part, to the alleged fault of empty chair defendants. Third, TCR received an additional $1,670,000 setoff by the trial court to account for pre- and post-trial settlements. Now, TCR challenges the trial court's setoff and allocation analyses, arguing it is entitled to an additional, fourth round of setoffs for settlements compensating Plaintiffs for injuries which were not tried to the jury, all while failing to proffer any evidence from the record supporting its additional setoff and allocation position. The trial court's setoff and allocation determinations were within its discretion and should be sustained on appeal.

COUNTER-STATEMENT OF THE CASE

A.) Introduction and Pre-Trial Matters

This case concerns the construction of 40 townhome-style residences located in twenty (20) buildings on Peas Island, just outside of Folly Beach, South Carolina (hereinafter "the Project"). The Project was constructed in 2006-2007 by Complete Building Corporation ("CBC") and its subcontractors and sub-subcontractors.

In early 2015, the Palmetto Pointe Condominium Property Owners Association ("Association") began to notice persistent roof leaking and hired Elite Development Group, LLC, to investigate these leaks. After this initial investigation, an engineer was then hired by counsel to investigate the buildings, and he found the initial building code violations and construction deficiencies that prompted this suit.

On February 13, 2015, the Association and (then) Class Representative Kathy Milner, initiated this construction defect suit (hereinafter "Plaintiffs" or "Association"; Initial Complaint). The suit sought compensation to remedy the defects at each of the forty (40) residences constructed as well as the common areas. *Id.* Plaintiffs asserted claims of negligence/gross negligence and breach of warranty against the General Contractor, Complete Building Corporation ("CBC"), its subcontractors, including Tri-County Roofing ("TCR"), and their sub-subcontractors which performed the siding, roofing, flashing, framing, grading, concrete work, fire sprinklers, deck waterproofing, aluminum wrapping of pressure treated beams, soffit, fascia, hand and guard rails, mechanical/electrical and painting/caulking work. *Id.*

B.) The Trial

On Monday, May 6, 2019, through Thursday, May 16, 2019, this construction defect suit was tried before The Honorable Jennifer B. McCoy against seven Defendants: (1) Complete Building Corporation; (2) Tri-County Roofing, Inc.; (3) Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding; (4) Eloy Alonso Vasquez; (5) Stanley's Vinyl Fence Designs; (6) WC Services, Inc.; and (7) JMC Construction, LLC and JMC Construction, Inc.

During the trial, Defendant Stanley's Vinyl Fence Designs, the vinyl exterior railing installer, settled with Plaintiffs and was dismissed from the case. (Tr. Trans. 339:7-10).

Defendants JMC Construction, LLC and JMC Construction, Inc. were dismissed by directed verdict at the close of Plaintiffs' case. (Tr. Trans. 663:25-664:6).

On Thursday, May 16, 2019, two causes of action against the remaining Defendants, negligence and breach of implied warranties, were submitted to the jury. (Tr. Trans. 826:24). The jury found for the Plaintiffs on both the negligence and breach of implied warranty claims, awarding actual damages in the amount of $6,500,000. (Tr. Trans. 836:25-839:24). The jury made an express finding of grossly negligent, willful, and/or wanton conduct as to Tri-County Roofing, Inc. and Complete Building Corporation and separately awarded punitive damages of $500,000 against each of them. *Id.*[1] The jury returned a defense verdict in favor of WC Services, Inc. *Id.*

Following the jury verdict of May 16, 2019 but prior to the trial court's entry of final judgment, three of the last four Defendants settled with Plaintiffs in the following amounts: CBC ($1,137,500); Miracle ($325,000); Vasquez ($325,000). (*See* June 10, 2019 Email from Jennifer Zambriczki to Judge McCoy's Clerk Serving Settlement and Release Chart) (hereinafter "Pl. Settlement and Release Chart").

C.) TCR's Post-Trial Motions

After the jury was excused, the Court granted the parties ten days to file post-trial motions. (Tr. Trans. 852:20-853:16). Given the upcoming Memorial Day holiday, Judge McCoy provided that post-trial motions would be due at 5:00 p.m. on May 28, 2019. (*Id*. at 862:18-22). On May 28, 2019, TCR filed six post-trial motions: (1) Judgment Not Withstanding the Verdict ("JNOV"); (2) New Trial Absolute; (3) New Trial *Nisi Remittitur*; (4) Motion Regarding Punitive Damages

[1] TCR's second-tier subcontractors, Miracle and Vazquez, were found simply negligent. A supplemental post-trial argument was conducted pursuant to § 15-38-15 of the South Carolina Contribution Among Tortfeasors Act, and the jury found that Vazquez and Miracle were each five percent (5%) responsible for the total damages. (Tr. Trans. 840:5-860:18; Verdict Form).

and Negligence *Per Se* Jury Charge; (5) Motion for Setoff; and (6) Motion to Dismiss Complete Building Corporation's ("CBC") Cross-Claims. (May 28, 2019, TCR Post-Trial Motions).

Plaintiffs filed a memorandum in opposition to each of TCR's post-trial motions, excepting TCR's Motion regarding CBC's crossclaims. (June 7, 2019, Pltfs' Memo in Opp'n. to TCR Post-Trial Motions). On June 7, 2019, the circuit court held a hearing and heard Plaintiffs' and TCR's arguments on TCR's post-trial motions. (*See generally* Hrg. Trans.). During and after the hearing, TCR and Plaintiffs submitted separate allocation charts to the Court: Plaintiffs' chart showed TCR was entitled to a $1,670,000 setoff, for a total judgment in the amount of $5,330,000, and TCR argued it was entitled to a $5,415,000 setoff, for a total verdict of $1,585,000. [2] (Hrg. Trans. 38:13-15; Pl. Settlement and Release Chart). TCR argues that it is owed a dollar-for-dollar setoff for every settlement dollar paid by any settling Defendant regarding issues that were not "otherwise removed from review by the jury and designated as issue releases", and also argues it is entitled to a credit for the $500,000 punitive damages award the jury levied against CBC. (TCR Initial Brief).

On July 23, 2019, the circuit court denied TCR's JNOV and New Trial Motions. (July 23, 2019, Form 4 Order). As for the Motion for Setoff, the circuit court agreed with Plaintiffs' allocation and granted a setoff in the amount of $1,670,000, for a total, final judgment against TCR

[2] Separate and apart from its unsupported and illogical arguments, TCR's math, then and now, has been repeatedly indecipherable. Further, the math and supporting analysis presented in the post-trial motion do not match that which was presented in the motion to reconsider, and neither match what is set forth in Appellant's Initial Brief, making this entire appeal improper as the math and arguments on appeal were never presented to the trial court for consideration. *Compare* (June 7, 2019, TCR Post-Trial Motions at 17-18) *with* (August 5, 2019, TCR MTR at 7) *and* (TCR Initial Brief at 45). For a typical illogical argument, please see pages 23-24 of TCR's Initial Brief, which assert that the failure to grant the additional setoffs results in TCR paying CBC's fire protection damages. By all appearances, the jury decided against the fire protection claim and award zero damages on this issue. (*See* Verdict Form).

of $5,330,000. *Id.* This was the final judgment of the trial court. (September 25, 2019, Order Denying TCR MTR at 6).

D.) TCR's Motion to Reconsider

On August 5, 2019, TCR filed a Rule 59(e) Motion to Reconsider ("Motion to Reconsider" or "MTR") the Circuit Court's July 23, 2019, Order. Specifically, TCR sought reconsideration on the amount of final judgment against TCR. (August 5, 2019, TCR MTR at 1). Plaintiffs filed a memorandum in opposition to TCR's Motion to Reconsider on August 15, 2019, responding to TCR's sole argument contained therein: the Court's decision regarding setoff. (August 15, 2019, Pltfs' Memo in Opp'n to MTR).[3]

E.) Trial Court's Order Denying TCR's Motion to Reconsider

On September 25, 2019, the trial court issued a reasoned order denying TCR's Motion to Reconsider. (September 25, 2019, Order Denying TCR MTR). Judge McCoy's Order Denying TCR's Motion to Reconsider highlighted the absence of evidence presented by TCR to establish it was entitled to a dollar-for-dollar setoff:

> TCR has not demonstrated to the court that it is entitled to a dollar-for-dollar setoff of all sums Plaintiffs have received from the settling defendants, nor can TCR do so based upon the record before me.

(September 25, 2019, Order Denying TCR MTR at 3). Conversely, the lower court was persuaded by the evidence Plaintiffs presented showing that it reduced its damages estimate and removed a number of defects from the jury's consideration prior to the close of evidence. *Id.*

[3] Because this motion included settlement amounts, which were confidential, Plaintiffs served this Motion and its Exhibit "A" to the Court and opposing counsel via email. (August 15, 2019, Email from Laura Knight to J. McCoy's Clerk Serving Pltfs' Memo in Opp'n to MTR).

F.) TCR's Subsequent Appeal

On October 14, 2019, TCR filed its Notice of Appeal. According to this Notice, TCR appeals from the: (1) July 23, 2019, Form 4 Order Denying TCR's JNOV, New Trial, New Trial *Nisi*, and Motion Regarding the Award of Punitive Damages; and (2) September 25, 2019, Order Denying TCR's Motion to Reconsider. (Notice of Appeal). On June 25, 2020, TCR filed its Initial Brief with this Court, **and has abandoned all issues on Appeal except for the issue of setoff.** *Id*.

STATEMENT OF PERTINENT FACTS

A.) Introduction

Appellant Tri-County Roofing ("TCR") was hired by the general contractor, Defendant Complete Building Corporation ("CBC"), to install the siding, roofing, and deck waterproofing/membranes at the Palmetto Pointe project (the "Project"). (Pl. Ex. 9). TCR, in turn, subcontracted out these scopes of work to second-tier subcontractors. The lion's share of evidence presented at trial concerned water damage resulting from the *improper installation* of TCR's three scopes of work: siding, roofing, and deck waterproofing/membranes. *See, e.g.* (Tr. Trans. 261:3-262:15) (testimony from TCR's expert, Eddie Polk, regarding severely degraded wood below the intersection of roof and decking); *see also* (Tr. Trans. 425:2-25) (testimony from TCR's owner, Mark Poyner, regarding sub-standard work of his subcontractors); (Tr. Trans. 382:10-20) (testimony from Association's expert, Russell Mease, regarding "very poor" coordination between trades at the intersection of TCR's scopes of work). After considering the evidence presented at trial, the jury returned a general verdict against TCR in the amount of $6,500,000, and separately found TCR grossly negligent, levying a punitive damages award of $500,000 (Verdict Form).

The trial court found that TCR was entitled a $1,670,000 setoff against the jury's verdict, and issued a Final Order reducing the total verdict amount against TCR from $7,000,000 to

$5,330,000. (July 23, 2019, Form 4 Order; September 25, 2019, Order Denying TCR MTR at 3). The trial court's setoff was based upon its knowledge of the case and its issues in extensive pretrial proceedings, with extensive briefings, the evidence and arguments presented at and after trial, Plaintiffs' proposed allocations, and the court's own review of all settlement agreements. (September 25, 2019, Order Denying TCR MTR at 3).

The trial court's setoff determination does not require reconsideration, as 1) each allocation is supported by the record; and 2) because TCR did not proffer (and has not preserved its ability to proffer now) an alternative allocation or factual support for any allocation other than that submitted by the Plaintiffs and adopted by the trial court.

B.) Settlements

Prior to the start of trial, Plaintiffs received $4,725,000 in settlements. (August 15, 2019, Pltfs' Memo in Opp'n to MTR, Ex. A). There is a category of these pre-trial settlements that TCR refers to as "agreed issue released settlements." [4] (TCR Initial Brief at 21, 33). TCR concedes it is not entitled to receive a setoff for the "issue release settlements," because those items were "removed from the trial of this case." (*Id*. at 33). There is a second category of 11 pre-trial settlements for which Plaintiffs have conceded TCR is entitled to either a full or partial setoff, which setoff totals $587,500. (August 15, 2019, Pltfs' Memo in Opp'n to MTR, Ex. A). For five of these settlements, Plaintiffs concede only a partial setoff, and it is to account for any potential overlap in the damages caused by the settling party with the issues tried before the jury. (August 15, 2019, Pltfs' Memo in Opp'n to MTR at 9-10).

[4] TCR's repeated references to "agreed" issue releases is a misnomer as to TCR. Plaintiff had issue release agreements with the general contractor (not TCR) to procure the general contractor's dismissal of its contractual indemnity cross claims against the settling parties. (*See* CBC Motion in Limine, 5/6/2019; CBC Settlement Agreements dated June 10, 2018 and June 9, 2019).

There are five settlements[5] and corresponding partial setoff amounts that TCR disputes: Atlantic, CBC, H and A, Cohen, and Novus (hereinafter, "Contested Settlements") (*Id.* at 6-7). Four of the five Contested Settlements were settlements that resulted in the *de facto* exclusion of all or substantially all of the settling Defendants' scope of work or related damages at trial. The fifth, CBC, was allocated by agreement of the parties; this same agreement is also contested by TCR.

TCR takes the position that it is entitled to a dollar-for-dollar setoff of the Contested Settlements, and that the trial court has no discretion in the matter:

> [S]etoff is a –required by the law. It is not discretionary. […] This is not a duty; it is not a burden. I don't have a burden to prove what should be a setoff because the law and the statutes say I'm entitled to it. […] The reason why this is important is because when we're talking about setoff what we're looking at is the damages that are incurred at the end, the injury is what we're looking at. We're not looking at whether or not a person put in the same type of flashing, not looking at if the person did the same type—scope of work.

(Hrg. Trans. 29:6-7, 15-17; 31:3-8). TCR does not proffer an alternative allocation based upon the evidence presented at trial or evidence otherwise in the record, nor does TCR argue for a different allocation methodology. (*See generally* TCR Initial Brief). Rather, TCR argues that the entirety of the Contested Settlements was for the "same injury" for which the jury awarded damages, and thus TCR is entitled to a dollar-for-dollar setoff for each. (*See Id.*; *see also* Hrg. Trans. 35; 44-45).

The speciousness of Appellant's argument(s) is well illustrated by its claim that it is entitled to a setoff on the punitive damages paid by CBC – even though the jury awarded separate punitive damage awards against CBC and TCR. There is no supporting legal precedent, logic, or common sense for this setoff claim – and it must fail. The failure of this portion of the TCR setoff claim

[5] In its post-trial briefings, TCR claimed it was entitled to a setoff of $22,500 paid by Builders Services Group ("BSG"). BSG installed the fireplaces at the Project, which were not litigated. TCR has dropped its claim to this setoff. (TCR Initial Brief at 21, fn.4).

clearly shows that 1) the setoff rights in the situation presented by this case are not automatic; and, 2) highlights the importance of the lack of evidence proffered by TCR to support any part of their setoff claim.

i. Allocation of Contested Settlements

Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.& H and A were the framing subcontractors at the Project. ("Framing Subcontractors"). The Framing Subcontracts' settlements, which totaled $1,200,000, covered two principle issues: (1) shear walls; and (2) window installation. Neither issue was presented to the jury, and neither was included in the damages sought at trial. (Tr. Trans. 726:3-9; Hrg. Trans. 44:17-45:21; 54:10-23). Plaintiffs' allocation accounted for any potential overlap; and the trial court reduced the final judgment against TCR by $125,000 to account for it.[6] TCR has not proffered any evidence showing that it is entitled to a dollar-for-dollar setoff for the monies paid by the Framing Subcontractors and has not proffered any evidence or argument contrary to Plaintiffs' allocation, which was adopted by the trial court. [7] To be clear, there is a dearth of evidence presented by TCR that framing defects were litigated or that they proximately caused any damage; the best TCR could do in its Initial Brief was to reference a quote that during siding replacement, the fastening of the existing substrate should be confirmed. (TCR Initial Brief at 13).

[6] Plaintiffs' allocation chart incorrectly indicated that the Framing Subcontractors settled for $1,250,000, and Plaintiffs' intent was to allocate a 10% setoff to account for potential overlap of issues at trial. The total framing settlements was actually $1,200,000; therefore, the 10% overlap setoff of $75,000 effectively became 11%.

[7] The shear wall field reports by Britt Peters were listed as stipulated Exhibits 459-463 in the list appended to Plaintiffs Pretrial Brief but were not entered into evidence. (Pl. Pretrial Brief). Also listed was Ex. 613, evidence regarding collateral litigation on the shear walls. *Id*. Similarly, the Britt Peters engineers were listed as potential witnesses in the joint voir dire presented to the Court and jury. (Joint Voir Dire). TCR has the shear wall evidence and testimony and chose not to address it.

Cohen's Drywall Company, Inc. ("Cohen's") supplied and installed the drywall and insulation at the Project. (November 2, 2017, Second Amd. S&C). In turn, Cohen's settlement involved damages associated with Cohen's scope of work. (July 12, 2018, Cohen's Settlement). Drywall issues related to firestopping repairs were litigated at trial (*see, e.g.* Tr. Trans. 394:4-25); however, insulation issues were not, and Plaintiffs sought no damages related to insulation deficiencies. (*See* P. Ex. 677). Plaintiffs allocated Cohen's $125,000 settlement equally between drywall and insulation so that each was attributed $62,500. (August 15, 2019, Pltfs' Memo in Opp'n to MTR). The trial court reduced the final judgment against TCR by $62,500 to account for the potential of drywall overlap. (July 23, 2019, Form 4 Order; September 25, 2019, Order Denying TCR MTR). TCR has not proffered any evidence showing that it is entitled to a dollar-for-dollar setoff for the monies paid by Cohen beyond the $62,500 allocated to drywall.

Novus Architects, Inc. ("Novus") provided professional architectural services at the Project. (November 4, 2016, Amd. S&C). Plaintiffs' claims against Novus arose out of Novus' breach of its professional standard(s) of care, and damages related to those unique breaches. (*Id.* at Ex. C at 3).[8] Plaintiffs' settlement with Novus, in turn, involved this claim of professional negligence, a cause of action inapplicable to TCR (Hrg. Trans. 42:17-23). At trial, Plaintiffs did not pursue a claim of professional negligence or otherwise put on evidence regarding design defects; TCR referencing some vague project involvement of an empty-chair architect, without showing any architect negligence or proximate causation of damages, does not alter the overwhelming evidence in the record concerning TCR's own negligent conduct. (*See* TCR's Initial Brief at 15-16; 38-39). This was recognized by the trial court:

[8] Novus had a professional services contract directly with the owner/developer that did not run through or incorporate the general contractor's contract, duties, or obligations. (*See* P. Ex. 5-A; Novus Owner Architect Contract).

> TCR has not demonstrated any evidence in the record to establish that Novus was, or ever could be, jointly responsible for TCR's hundreds or perhaps, thousands of code violations in the defective installation of otherwise non-defective materials such as roof shingles and siding. Yet, TCR advocates for a setoff in the entire amount of the Novus payment. The court found initially and now reaffirms its earlier finding that TCR has not established that the Novus settlements and other like settlement overlap or coincide with the damages the jury awarded against it.

(September 25, 2019, Order Denying TCR MTR at 5). If anything, TCR's half-hearted attempts to blame empty chair defendants like the architect underscores the trial court's determination that damage allocation was essentially tried to the jury. *Id.*

Plaintiffs allocated $65,000, or 10% of Novus' settlement, to account for any potential overlap between damages caused by Novus' and damages caused by TCR's. (August 15, 2019, Pltfs' Memo in Opp'n to MTR). The trial court agreed and further reduced the judgment against TCR by another $65,000. (July 23, 2019, Form 4 Order; September 25, 2019, Order Denying TCR MTR). TCR has not proffered any evidence showing that it is entitled to further setoff and has proffered no evidence contradicting Plaintiffs' allocation which was adopted by the trial court.

ii. Allocation of CBC - Pre- and Post-Trial Settlement

Plaintiffs and CBC contractually allocated CBC's $2,137,500 settlement as follows:

- CBC's initial $1,000,000 settlement (by the first exhausting insurance carrier), which was consummated by a covenant not to execute entered into a year before trial on July 10, 2018, was allocated between HVAC, concrete, flooring, interior handrails, and fireplaces.

- CBC's subsequent $1,375,000 post-trial, but pre-final judgment settlement was allocated between exterior railings ($137,500); fire separations ($100,000); HVAC framing ($400,000); and punitive damages ($500,000).

(CBC Settlement Agreement, June 6, 2019). CBC's settlement was allocated on June 6, 2019, before the trial court entered final judgment against TCR. (July 23, 2019 Form 4 Order). Of the allocated items, the record reflects that only the $137,500 allocated to exterior railings related to a damage issue tried to and decided by the jury. *See, e.g.*, (August 5, 2019, TCR MTR at 4) (TCR

acknowledging that HVAC, window product, grading, paving, flooring, interior trim and railings and concrete issues "were taken out of the case" and not before the jury). This Court agreed and provided TCR a $137,500 setoff to account for this damage overlap. (July 23, 2019 Form 4 Order; September 25, 2019, Order Denying TCR MTR). This determination is reasonable and supported by the facts of this case. On the contrary, allowing TCR to set off the remaining proceeds that CBC and Plaintiffs contractually allocated to damages that are foreign to the damage TCR caused is unreasonable and conflicts with South Carolina law. TCR seeks to setoff CBC's settlements which were allocated by agreement to damages for which TCR, as a subcontractor, was not responsible. The Plaintiffs had the right to allocate the CBC payments to damage elements which were not TCR's shared responsibility. It did so, and TCR cannot unwind those allocations, having itself chosen not to settle with the Plaintiffs.

C.) The Association Reduced its Damages at Trial and Asked for Different Damages at Trial to Account for Money Received and Issues Resolved

The Association reduced its damages at trial by $4,853,000, which exceeds the $4,137,500 in pretrial settlements for which no setoff is being offered. In other words, there is no "windfall" or "double recovery," because Plaintiffs reduced their repair estimates at trial and/or eliminated settled damage claims by more than the amount received in pre-trial settlements. The jury was presented with at least five different damage analyses during the May 2019 trial of this case: Plaintiffs' revised trial estimate; Plaintiffs' five category break down of their trial estimate; Plaintiffs' outdated December 2017 estimate; and the original and revised defense estimates (Tr. Trans. 179:21-24).[9]

[9] The jury heard from Defendant CBC's repair estimator, Steve Watkins with Watkins Services. Watkins' estimate, based on a limited scope of a series of spot repairs, was rejected by the jury. (*See* P. Ex. 931).

The jury heard from the Association's repair cost expert, licensed general contractor Jay Handegan[10], who prepared a cost estimate to perform the repair scope recommended by Plaintiffs' forensic engineer, Russell Mease, P.E. (Tr. Trans. 591:8-17). In December 2017, Mr. Handegan issued a **$15,258,000** damage estimate (P. Ex. 677). At trial, Plaintiffs took this 2017 repair estimate, crossed out numerous items that no longer applied to the case being tried, and added repair costs for several additional defects which had arisen (including increased fire suppression repair costs). (Tr. Trans. 591:8-592:17). This revised estimate (P. Ex. 1049) was marked for identification purposes only, but the foregoing details were put into evidence through the oral testimony of Plaintiffs' repair expert, Jay Handegan. (Tr. Trans. 591:8-592:17). The revised total repair cost testified to by Handegan was $13,428,000. (*Id.* at 592:9-11).

Anticipating a potential need for allocation by trade/Defendant, Plaintiffs' counsel asked Handegan to estimate the breakdown of his $13,400,000 estimate into five different categories, which he did:

Siding and Trim:	35%
Roofing and Decks	25-30%
Firewalls	10%
Sprinklers	15%
Miscellaneous	10%

(Tr. Trans. 592:18—593:25). Interestingly, as TCR was responsible for Siding, Trim, Roofing, and Decks, its share of the $13,400,000 damages was 60-65%; 62.5% of $13,428,000 is $8,375,000 attributed to TCR's scope of work by Plaintiffs' repair expert.

Plaintiffs further reduced the damages it sought by asking the jury to return a verdict of $12,400,000, plus loss of use, to account for issues which were not litigated at trial:

[10] TCR refers to Plaintiffs' repair estimator as "McCormick." Plaintiffs believe this was in error and TCR intended to refer to Mr. Jay Handegan in each instance.

> 13, 4, 28. $13,428,000, that is what Mr. Handegan told you was his revised estimate. That's how he revised Exhibit 677 when he testified to you at trial: 13.428. 26,000 of that is attributable to the clubhouse. We never figured out who did the clubhouse, so we're going to just knock it off the top. A little less than a million of that relates to windows, and the only window claim we really addressed with you all much this week was the failure to properly trim[11] around the windows and to leave the caulk joint between the window and the trim so that works right. That's part of this case. The window product itself is not part of this case. So, we're deducting that, and we're asking you to return a verdict for plaintiffs of actual damages of $12.4 million plus the homeowners' loss of use.

(Tr. Trans. 725:22-726:25).

The Association also asked the jury to include a loss of use award in its verdict. Mr. Handegan opined that all 40 homeowners would have to vacate their homes for "3 months" during the repair of the Project. (Tr. Trans. 606:18-24). The jurors were then asked to compute the loss of use that should be awarded based on the reasonable rental value of the residences:

> The testimony is that Mr. Handegan is going to be in each residence for three months. There's forty residences, and the loss of use of the rental value of those residences is from 3,000 to 3,500 per month. So, we're asking for a $10,000 loss of use award for each homeowner for a total of $400,000. And you hear me say for each homeowner. Y'all may recall in evidence is an exhibit whereby each homeowner has assigned their claim to the homeowners association to bring and complete this action on their behalf so that they can get these residences repaired properly. So, it is, in fact, part of our claim in this case for the homeowners. So, 12.4 and 400,00 will be $12.8 million, and that's what we'd like you to return a verdict for, $12.8 million for plaintiffs.

(Tr. Trans. 726: 11-25).

Mr. Handegan removed $3,827,000 from his 2017 estimate (see Note 18 and accompanying text), and Plaintiffs further reduced damages sought by an additional $1,026,000 during closing, for a total reduction of $4,853,000. *Compare* (Tr. Trans.726:9-11; 726:23-25) *with* (P. Ex. 677). This reduction exceeds the amount of total settlements received prior to trial, $4,180,000, by approximately $700,000. By limiting the damages requested at trial to loss of use

[11] At trial, TCR conceded that it and its subcontractor, Miracle, applied the trim around the windows – not the framer. (Tr. Trans. 376:19-377:8).

and $12,400,000 for remaining repair issues, the Association asked the jury to compensate it for "different injuries" that were not previously paid for by other Defendants. The verdict the jury ultimately returned is millions of dollars less than what the Association requested. *Compare* (Verdict of $6,500,000) *with* (Tr. Trans. 726: 11-25) ($12,800,000 verdict requested). TCR 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.

D.) Damage Allocation Was Tried to the Jury Without Objection

The parties at trial, including TCR, effectively tried the issue of setoff to the jury, thereby ensuring Plaintiffs did not receive a double recovery. The jury was told about the multiple defects and damages suffered by Plaintiffs at the Project: the original $15,000,000+ repair estimate was introduced by Defendant CBC and was not objected to by TCR. (Pl. Ex. 677; Tr. Tran. 600:1-25). Plaintiffs' reduced repair estimate was used extensively by Plaintiffs at trial and it was clear that the reduction was due to issues not on trial. (Tr. Tran. 591:8-592:17). Defendant CBC dissected the original, $15,000,000+ estimate during closing and pointed out, line by line, items which Plaintiffs were paid for in prior settlements. (Pl. Ex. 677; Tr. Tran. 735:6-23; 738:18-751:6). In its Order denying TCR's Motion to Reconsider, the trial court recognized that damage allocation was essentially tried to the jury:

> The court notes also and has considered that counsel for the general contractor, Complete Building Corp. ("CBC") argued extensively to the jury that the jury should exclude from its award damages for which the plaintiffs had been compensated prior to submission of the case to the jury. On its face, the award of approximately half the plaintiffs' claimed damages indicates that the jury may have done that here.

(September 25, 2019, Order Denying TCR MTR at 5).

In addition to what the jury heard from Defendant CBC, TCR's counsel expressly asked the jury to allocate TCR's fault and liability based upon the evidence adduced at trial. Specifically,

TCR's counsel pointed the finger repeatedly at the architect during closing arguments, reminding the jury of his clients' testimony about "all those meetings" with the architects and other professionals during construction. (Tr. Tran. 755:5-13). TCR's counsel used the word "architect" six times; "engineer[]" three times; and mentioned at least three other parties, who were named parties but were absent from trial, by name and/or role. (Tr. Tran. 755:8, 12; 760:9-10; 761:2; 763:15 ("architect"); 760:7; 763:16-17 ("engineer[]"); 760:6-11, 15; 763:17 ("Billy Mentor from CertainTeed; Alan Fields from Curry Engineering; Jim McGuire from—the architect; Tommy Smith, an architect […]."). Each time, TCR's counsel assigned blame and responsibility to those "empty chairs" and asked the jury to "be reasonable when you look at the numbers" and that it is "not right" to transfer all the risk to TCR. (Tr. Tran. 763:6-20).

By the time TCR rested its case, the evidence before the jury included: (1) repair estimates pricing all issues affecting the Project from both the Association's and TCR's perspectives; (2) the Association's revised estimate, reduced to account for resolved issues and augmented to account for damages attributable to the fire protection defendant present at trial, and further reduced during the Association's closing argument to account for untried issues; and (3) the Association's initial, $15m estimate, struck through by Defendant CBC to account for untried issues.

It would be inequitable to simultaneously allow TCR to assign liability to empty chairs, an argument which was successful if one looks at the jury's verdict, and then also receive a setoff for the amounts paid by those empty chairs. A defendant is not entitled to a double reduction. Further, the adoption of such a doctrine would require future plaintiffs to prove a full set of damages (settled and unsettled) at each trial. The motivation to settle would be chilled, and construction defect trials with dozens of defendants would proliferate in and clog our trial courts.

STANDARD OF REVIEW

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 v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911).

Regardless of the standard applicable here, the result remains the same because TCR is not entitled to further setoff as either a matter of law or equity.

LEGAL ARGUMENT

TCR is not entitled to further setoff for a number of reasons, including: (1) TCR fails to show, through facts, law, or otherwise, that settling defendants paid more than $1,670,000 for the *same* injury awarded against TCR; (2) TCR fails to show, through facts, law, or otherwise, that the Court unfairly or unreasonably allocated any settlement; (3) TCR seeks to reapportion agreed-upon allocations solely to benefit itself; (4) TCR has already received four damage reductions and setoffs and is not entitled to further setoff based on *The Oaks* decision; (5) TCR already asked the jury to allocate fault and damages amongst different issues and Parties; and, (6) further setoff is not necessary to provide justice between the parties.

A. TCR Has Not Shown It Is Entitled to Further Setoff

Setoff only arises when "the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012). Stated differently:

> [d]espite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any reduction in the judgment must be from a settlement for the same cause of action. Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset.

Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 438, 803 S.E.2d 475, 482 (Ct. App. 2017) (citations omitted) (*quoting Riley*, 414 S.C. at 196, 777 S.E.2d at 830). When a settlement involves more than one claim, the circuit court must make the factual determination of how to allocate the settlement between the two claims. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). The party seeking a setoff bears the burden of demonstrating to the court both that it is entitled to a setoff, and also the amount of the setoff. *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 386, 166 S.E.2d 308, 312 (1969) ("The defendants, upon whom the burden of proof rested to establish the amount of the setoff with

reasonable certainty, have failed to supply sufficient evidence to the master to permit such specific findings, and have failed to convince this court that the figure reached by the master and the lower court was erroneous."); *see also In re Wells,* 43 S.C. 477, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard setoff rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just," particularly where "there is an executed contract between [the parties], which is not contested as between them but which is sought to be invalidated by third parties").

i. TCR Has Not Shown, Either Here or in The Court Below, that the Settlement Amounts in Excess of the $1,670,000 Setoff Already Granted Were Paid to the Association on the Same Claim(s) for the Same Injur(ies) as Those Awarded Against TCR by the Jury. TCR Fails to Proffer Any Evidence Whatsoever Showing Its Entitlement to a Dollar-For-Dollar Setoff and the Issue is Now Waived on Appeal

TCR repeatedly states that the Association's settlements, both pre- and post-trial, were all related to the "common injury relating to the cost to repair" the Project, and further that the Association is only entitled to "one recovery for their injury." (TCR Initial Brief at 33, 35). These statements are conclusory, lack evidentiary support, and do not make logical sense.

In its brief, TCR does not explain *how* any of the settlements totaling $4,180,000 compensated the Association for the same injuries as those tried to the jury. What amount of the framing, insulation, drywall, insulation, or architectural design settlements overlap with what the jury awarded the Association? How does the settlement by the architect overlap with loss of use[12] and was this settlement for breach of warranty or professional negligence? TCR has realized that

[12] No settlement compensated Plaintiffs for loss of use – a "different" injury Plaintiffs asked the jury to include in its verdict. Thus, loss of use could make up much of the jury's award. Neither TCR nor this Court can dissect the jury's verdict to find out. . *See, e.g., Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) ("Appellants waived appellate review [trial court's failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter.").

it cannot make such a showing, and instead has permeated its briefing with a flawed initial premise: "damages in construction defect cases like the Palmetto Pointe litigation all arise out of the same set of facts or type of injury." (TCR Initial Brief at 35). It then uses this fallacious[13] jump-off point to justify its conclusion, which is that TCR is entitled to a non-discretionary setoff (as a matter of law) for all settlements, except for those it calls "issue released" settlements. (*Id.* at 42). TCR does not believe it has to show, e.g., that the settlement monies paid by the architect were paid to compensate Plaintiffs for the *same claims* for the *same injuries* as those tried to a verdict; TCR attempts to unilaterally alter South Carolina setoff jurisprudence by replacing "same claims" with "same set of facts" and repeats this revision in the hopes that this Court will take the bait.[14] Since TCR already submitted its brief, it abandoned any chance it had to answer make these, and similar, showings.

Not only has TCR abandoned this issue, it is impossible for TCR to prove that the verdict overlaps with the "same" damages or claims already compensated. As explained by the trial court,

> TCR has not demonstrated to the court that it is entitled to a dollar-for-dollar setoff of all sums Plaintiffs have received from the settling defendants, nor can TCR do so based upon the record before me.

[13] TCR implicitly concedes all construction cases do not result in the same inseparable damages when it concedes that issues can be separated out, and separately released, and that TCR is not entitled to setoff from "issue release" settlements which resulted in a given issue not being tried as part of these typical, single damage, construction defect cases; hence the fallacious jump off point. (*See* TCR Initial Brief at 33) ("TCR is entitled to setoff of all the settlements that were not otherwise removed from the trial of this case […]"); (*See also Id.* at 40) ("TCR is not seeking to get credit for the items labeled as issue releases twice. TCR concedes that it […] received the benefit of a lower trial demand when the items labeled as issue releases were taken out of Respondents' repair cost estimate.").

[14] *See, e.g. Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 438, 803 S.E.2d 475, 482 (Ct. App. 2017); *see also Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986)

(September 25, 2019, Order Denying TCR MTR at 3). The Association asked the jury to return a 12.8-million-dollar verdict that focused on injuries related to roofing, siding, balconies, fireproofing issues, and loss of use. (Tr. Trans. 592:18—593:25; 725:22-726:25). The jury awarded actual damages of $6,500,000, and "the court cannot parse the jury's award to determine which items or portions of plaintiffs' claims it accepted or, conversely, which items it allowed." September 25, 2019, Order Denying TCR MTR at 3).

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 opined that all homeowners would have to move out of Peas Island for three (3) months. (Tr. Trans. 606:18-24.). The jury was then asked to compute the loss of use that should be awarded by rental value testimony from the Palmetto Pointe homeowners. (Tr. Trans. 726:11-25;325:4-8; 555:20-24).

TCR cites no South Carolina authority that supports its claim that settlements compensating an association for the repair of one building component is the "same" as a jury compensating the association for the repair of another building component.[15] Accordingly, this argument is abandoned. *See Bennett v. Inv'rs Title Ins*. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when appellants fail to cite any case law for their positions and make conclusory arguments, the appellants abandon those issues on appeal). In fact, prevailing South Carolina precedent indicates the opposite. In *The Oaks*, for example, the South Carolina Court of Appeals recently addressed setoff in the construction defect context and its analysis considered the cost to repair different building components as different injuries. *The Oaks at Rivers Edge Property*

[15] TCR cites to a Florida case to support the proposition that "[g]enerally, damages in construction defect cases like the Palmetto Pointe litigation all arise out of the same set of facts or type of injury." (TCR Initial Brief at 35).

Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017). *The Oaks* Court ultimately determined that defendants were not entitled to setoff settlements that compensated an association for certain building components, because the damages awarded at trial addressed repairs of other building components. (*Id.* at 420 S.C. 424, 439, 803 S.E.2d 475, 483.) The same is true here – the damages awarded at trial address repairs of building components independent of those addressed by settlement.

Further, TCR's arguments as to the significance of the form and content of the verdict form are misplaced. Notably, Appellant moved in limine for special verdicts. (TCR Motion in Limine for Special Verdicts; Tr. Trans. 115:23-116:20). The Court expressly assigned to TCR the task of drafting and submitting a proposed verdict form. (Tr. Trans. 116:8-11). This never happened. (*Id.* at 669, 680-699). Nor did Appellant ever object to the proposed verdict form proffered by the Judge. *Id*. TCR's suggestion otherwise throughout its initial brief is pure sleight of hand.

ii. TCR Has Failed to Meet its Burden Showing Settlement Allocations Are Unfair or Unjust; Nor Has it Proffered an Alternative Allocation

The Association's allocation and the Court's approval of the same is reasonable, fair, and supported by both the record and South Carolina law. Not only has TCR abandoned its ability to substantively (factually) contest the setoff granted by the trial court, it has separately, but relatedly, abandoned its ability to factually contest the Association's allocation of settlements and the trial court's approval of the same. TCR's arguments on appeal do not negate TCR's lack of setoff evidence proffered to the trial court and do not show how TCR's proffered allocation is fairer than Plaintiffs' allocation. In fact, TCR makes no attempt at allocation, and instead claims it is entitled to setoff the entire amount of the Contested Settlements, dollar-for-dollar. Why is TCR entitled to a setoff of the entire framing related settlement(s), as opposed to the ten percent (10%) allocation

proffered by the Association and approved by the trial court? The trial court explained its rationale deciding otherwise in its Order denying TCR's Motion to Reconsider:

> By way of illustration, H and A framing paid $500,000 for damages to shear walls, window installation, deflecting floors and framing defects. Arguably, none of that settlement represents compensation for damages which are included in the jury's verdict against TCR. Nevertheless, the court in the exercise of its discretion, accepted the plaintiffs' allocation of $50,000 of that sum as damages potentially representing TCR's joint liability, and the court included that amount in its setoff. The court analyzed each of the settlements in the same manner.

(September 25, 2019, Order Denying TCR MTR at 4). Taking this example, the Association's allocation of 10% of the framing settlement(s) was not arbitrary. Rather, it was supported by the record:

> -Deflecting floors: no evidence presented that the flooring needs to come up at the Project. (Tr. Trans. 739:6-10; 740:10-14; 741:10-14).
> -Window installation: windows no longer part of case, not litigated and, window repair damages removed during closing argument. (Tr. Trans. 739:3-6; 740:20-22; 741:9-10).
> -Shear Walls: not litigated and not in estimate. (P. Ex. 677).

Continuing with this example of the framing settlements, TCR makes no attempt to show how or why it is entitled to a dollar-for-dollar setoff, or why the Association's reasoned allocation is unfair or unsupported. Instead, TCR simply calls the Association's allocation "arbitrary" and leaves it at that. (TCR Initial Brief at 30-31).

Although TCR made tangential references in the trial transcript as to the possible responsibility of e.g., the architects and engineers for some of the defects at the Project (Tr. Trans 445:4-14; 448:21-452:25), TCR never connected the dots as to probable responsibility, or for which defects, at trial or in its apportionment materials. Stated differently, TCR never showed the trial judge why any prior settlements by design professionals were not more properly "allocated" to the defects that were not tried. As stated by the trial court, "TCR has failed to establish that the settlements plaintiffs received in excess of $1,670,000 are damages awarded against a settling joint

tortfeasor who has compensated the Plaintiff for the same claim and for the same injury." (Order Denying MTR at 4).

B. Allocation of the CBC Settlements Were Fair, Reasonable, and Supported by the Record, and TCR Seeks to Reallocate the CBC Settlements Solely to Benefit Itself

South Carolina law grants the trial court substantial discretion to allocate settlement proceeds between claims in applying a setoff. *See Rutland v. S.C. Dep't of Transp*., 390 S.C. 78, 87, 700 S.E.2d 451, 456 (Ct. App. 2010); *Welch v. Epstein*, 536 S.E.2d 408, 426, 342 S.C. 279, 313 (Ct. App. 2000). Here, the trial court properly allocated and setoff all applicable settlements, including the CBC settlements. TCR's arguments to the contrary are unavailing and misapprehend prevailing law.

First, TCR claims that the Association's allocation of its settlements with CBC is "untimely," because the general verdict was set by court order on May 16, 2019. (TCR Initial Brief at 21). If the May 16, 2019, court order was the "final judgment" of the trial court, then it would be incumbent upon TCR to either move to reconsider that order or appeal it. TCR did neither. Instead, TCR moved to reconsider the court's actual final judgment, which was the July 23, 2019, court order allocating the setoffs and reducing the total general verdict amount against TCR from $7,000,000 to $5,330,000. (July 23, 2019 Form 4 Order). TCR does not appeal the May 16, 2019, Form 4 Order; rather, it appeals the July 23, 2019 Form 4 Order and the trial court's September 25, 2019 Order Denying TCR's Motion to Reconsider. (TCR's NOA). The settlement agreement with CBC was entered on June 6, 2019, over a month before the trial court entered the final judgment against TCR. (CBC Settlement Agreement). The allocation was neither untimely nor was it improper. It simply did not benefit TCR.

TCR next argues that the Association's allocation was "improper", and the CBC settlement was actually "partial satisfaction of a judgment." (TCR Initial Brief at 21). Again, TCR cites to no caselaw in support of this position. Rather than encouraging settlements, such an approach would encourage defendants in multi-party litigation not to settle but to instead vie to be the last one standing in the hope that other parties will pay more than their fair share of the verdict. This is contrary to South Carolina's "strong public policy favoring the settlement of disputes." *Chester v. S.C Dep't of Pub. Safety*, 388 S.C. 343, 346. 698 S.E.2d 559, 560 (2010). Furthermore, settlement dollars are not synonymous with damages and instead include the value of avoiding the risk and exposure of trial and appeal. *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 252 (Fla. 1995); *see also Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203, 206 (App.1993); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 431 (Tex.1984).

TCR asks this Court to reallocate and setoff CBC's two settlements totaling $2,137,500 in their entirety just because the allocations Plaintiffs and CBC agreed to benefit Plaintiffs as opposed to TCR. However, this fact alone is insufficient to warrant reallocation by this Court. *Riley v. Ford Motor Co.,* 414 S.C. 185, 196, 777 S.E.2d 824, 831 (2015). As explained by our Supreme Court in *Riley*,

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. (citations and quotations omitted). Thus, a Court cannot "disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to [Plaintiff]." *Id.*

Here, Plaintiffs and CBC contractually allocated its $2,137,500 settlement as follows:

- CBC's initial, 2018, $1,000,000 settlement (by the first exhausting insurance carrier) was allocated between HVAC, concrete, flooring, interior handrails, and fireplaces.[16]

- CBC's subsequent $1,375,000 settlement was allocated between exterior railings ($137,500); fire separations ($100,000); HVAC framing ($400,000); and punitive damages ($500,000).

Of these items, the record reflects that only the $137,500 allocated to exterior railings related to a damage issue tried in front of the jury. *See, e.g.*, (TCR Motion to Reconsider at 4) (TCR acknowledging that HVAC, window product, grading, paving, flooring, interior trim and railings and concrete issues "were taken out of the case" and not before the jury). This Court agreed and provided TCR a $137,500 setoff to account for this overlap. This determination is reasonable and supported by the facts of this case. On the contrary, allowing TCR to setoff the remaining proceeds that CBC and Plaintiffs contractually allocated (and which does not overlap with TCR's actual damage) is unreasonable and conflicts with South Carolina precedent.

To the extent TCR argues that it is entitled to a 100% setoff of the contractually allocated CBC settlement, because the settlement was actually in satisfaction of a judgment, it cites to no caselaw in support of this argument. Such an approach "would defeat 'the preeminent object of the [setoff] statute to encourage settlement. Therefore, a construction which places a nonsettling defendant in an advantageous position vis-á-vis settling tortfeasors is to be avoided." *Daversa v. P.T.C. Properties*, 599 N.Y.S.2d 432, 434 (Civ. Ct. N.Y. 1993) (quoting *Matter of New York City Asbestos Litig.*, 188 AD2d 214, 218 [1st Dept 1993]) (emphasis added). The *Daversa* court further observed that "[t]here is no justification for rewarding recalcitrant nonsettling defendants by

[16] TCR claims that $1,000,000 of CBC's settlement, which was paid pre-trial by one of CBC's insurers, should be considered a post-verdict settlement for the purposes of allocation. (TCR Initial Brief at 17). This agreement was reached on July 10, 2018.

permitting them to apply the [statutory] offset in a manner that reduces or even obliterates their own liability in cases where plaintiffs are not fully compensated." *Id*.

C. TCR is Not Entitled to a Setoff for the Punitive Damages Award Levied Against CBC

After hearing the evidence, the jury found TCR was grossly negligent and imposed a punitive damage verdict against TCR in the amount of $500,000. (Verdict Form). The jury separately found Defendant CBC was grossly negligent and imposed a punitive damage verdict against CBC. (Verdict Form).

TCR is not entitled to a setoff for CBS's payment of the punitive damage award levied against CBC by the jury. Section 15-32-520(G) requires that "[i]n an action with multiple defendants, a punitive damages award must be specified as to each defendant, and each defendant is *liable only for the amount of the award made against that* defendant." S.C. Code § 15-32-520(G) (emphasis added); *see also McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72, 545 S.E.2d 286, 288-89 (2001) (holding that punitive damages claim against a second tortfeasor was entirely separate from compensatory and punitive award against the first tortfeasor).

Clearly, the jury separately levied punitive damages awards against TCR and CBC—distinct awards for distinct injuries. (Verdict Form). TCR should get no credit for the $500,000 punitive damages award levied against CBC.

D. TCR Has Already Received a Triple Setoff and is Not Entitled to Further Setoff

TCR has already effectively received a triple setoff. First, Plaintiffs reduced their damages at trial and only asked the jury for compensation related to defects and damages resulting from work performed by the Defendants who remained in the case at the time of trial (to the exclusion of settled issues), and further reduced their damages by an additional $1,000,000 during closing

arguments to account for untried issues. Second, setoff was tried to the jury who awarded Plaintiffs a further reduced amount. Third, TCR received an additional $1,670,000 setoff by the trial court to account for pre- and post-trial settlements which compensated the Association for the same claim of injury. As a result, additional setoff is not necessary to provide justice between the parties.

i. TCR is Not Entitled to Further Setoff Based on this Court's Recent Decision in The Oaks

TCR makes the argument that "the seminal cases discussing setoff in South Carolina involve claims for wrongful death and survivorship," and that damages in a construction case are unique, because they "all arise out of the same set of facts or type of injury." (TCR Initial Brief at 29). This Court recently issued an opinion addressing setoff in the context of a multi-defendant, construction defect case that gives guidance in this arena where there was previously little--guidance which illustrates the fallaciousness of TCR's "same injury" argument.

In *The Oaks at Rivers Edge Property Owners Ass'n, Inc. versus Daniel Island Riverside Developers, LLC*, the plaintiffs filed suit against the developer, general contractor and subcontractors involved in the construction of a thirty-six (36) unit condominium complex alleging a wide range of defects that resulted in widespread water intrusion and damages. 420 S.C. 424, 433, 803 S.E.2d 475, 480 (Ct. App. 2017). Prior to trial, the plaintiffs settled with a number of defendants, including the window manufacturer, window installer, caulking subcontractor, and framer. (*Id*. at 434.) The remaining defendants proceeded to a bench trial and were found jointly and severally liable for negligence, gross negligence, and negligent misrepresentation, as well as separately liable for various other causes of action, and the court awarded the plaintiffs $7,934,704.06 in damages for the cost of repair. (*Id*. at 435.) Thereafter, defendants moved for setoff. *Id*. The *Oaks* trial court denied the motion and an appeal followed. *Id.*

Both at the trial court level and on appeal, the defendants argued the evidence presented at the *Oaks* trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the trial court's failure to setoff the verdict by the prior settlement amounts resulted in a double recovery for the plaintiffs. (*Id*. at 436.) The plaintiffs countered, arguing principally that the defendants were not so entitled because the plaintiffs removed from their claimed damages those amounts received from the settling defendants, and thus the defendants had already received a reduction in damages as contemplated by the Act. (*Id*. at 441.) In reaching its decision to affirm the trial court's denial of the motion for setoff in *Oaks*, this Court engaged in a comprehensive recitation of relevant setoff precedent, both in relation to common law setoff as well as that encompassed by the Act. *(Id*. at 436.) Turning to the facts of the case, the Court of Appeals first noted that the trial court's order levying damages against the non-settling defendants included repairs for damages "independent of those addressed by the settlement[s] […]." (*Id*. at 439.) For example, while the settling subcontractors' defective products and work likely contributed to the need to remove certain portions of exterior cladding at the property, testimony at trial evidenced that the entirety of the brick and stucco, as well as compromised wood sheathing and framing, had to be repaired anyway to remedy water-related deterioration and/or building code violations. *Id*. This discussion highlights the unique task of distinguishing injuries in the context of a construction defect case involving water intrusion and the damages resulting therefrom; more importantly, however, this Court's opinion in *The Oaks* removes the notion that such a task is impossible and therefore automatically requires a setoff.

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." (*Id.* at 441.) Put differently, the plaintiffs recognized that the work of the window manufacturer, window installer, caulking subcontractor and framer contributed to the water intrusion at the property; accordingly, the plaintiffs reduced their cost of repair estimate at trial by $4,260,497.93, a sum which exceeded the amount paid by the aforementioned subcontractors in pre-trial settlements. *Id*. By virtue of this reduction, the Court of Appeals held that defendants "already received the benefit of the settlements," rejected the notion that failing to further reduce the verdict would constitute a double recovery for the plaintiffs, and affirmed the trial court's denial of the motion for setoff. (*Id*. at 442.) In essence, the Court of Appeals refused to grant the defendants a second "bite" at setoff: a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law.

The *Oaks* decision confirms that TCR is not entitled to additional setoff because the Association reduced its damages at trial to account for the amounts received in pre-trial settlements for which no setoff was offered. *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).This Association reduced their repair estimates at trial and conceded setoffs by more cumulatively than the amount the Association received in pre-trial settlements. The Association's December 2017 Damage estimate was $15.258m. (P. Ex. 677). There were $4,137,500 in pre-trial settlements that resolved various issues and/or reduced Plaintiffs damages.[17] Handegan removed $3,827,000 in resolved items from his trial estimate,[18] initially reducing the original damages to

[17] There were $4,725,000 in pre-trial settlements total; Plaintiffs conceded setoffs as to $587,500 of these funds, for a net of $4,137,500 in remaining settlements at issue.

[18] Handegan removed $98,672 for labor, $40,210 for material, and $2,821,880 for subcontracts. (Ex. 1049 at 11). Per the original estimate, the labor needs to be grossed up by 37% for payroll taxes to $135,181; and the material needs to be grossed up by 8.5% for sales taxes to $43,628. *Id.* When these adjusted numbers are added to the subcontractor expense, the removed line items subtotal $3,000,689 in direct costs removed. The indirect cost reduction associated with this

$11,431,000. He thereafter added back $789,394 in additional fire suppression damages and an additional contingency "due to recent findings" in the amount of $1,220,800 for total add backs of $2,011,000 which, with minor adjustments, results in a revised trial estimate of $13,428,826. (Tr. Trans. 592:4-17).[19] During closing, plaintiffs' counsel removed an additional $1,026,000 of prior damages, accounting for window-related and clubhouse damages, and asked the jury for $12,400,000 in actual repair damages. (Tr. Trans. 725:22-726:11). Between the pre-testimony reduction of $3,827,000 and the $1,026,000 reduction in closing, Plaintiffs removed $4,853,000 from their original damages – in excess of the $4,180,000 pre-trial settlements for which no setoff was offered.

Surprisingly, immediately upon cross examining Handegan, the Defendant General Contractor, CBC, then put Plaintiffs original 2017 estimate into evidence in the approximate amount of $15,000,000 ($15,258,000). (P. Ex. 677). This occurred without objection by TCR. CBC then used the original estimate to cross examine Handegan. (Tr. Trans. 597:5-620:7). CBC and TCR had Handegan confirm many of the items that had been crossed out (removed) in his 2019 revised estimate. (*See e.g.* Tr. Trans. 611:1-25 (windows/window trim); 609:2-11 (finished flooring); 609:15-17 (concrete); 610:4-6 (subfloor); 623:13-19 (clubhouse)).

During closing, Plaintiffs' counsel deducted several more items from Handegan's published trial estimate and netted it down to $12,400,000. Plaintiffs' counsel asked the jury for

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adjustment is 9% for engineering fees and 17% for overhead and profit, resulting in a total reduction of approximately $3,826,779. It is necessary to do the implicit math (which TCR ignored) to understand the full reduction because in Ex. 1049, Handegan netted the eliminated costs and the new costs *before* making his indirect cost adjustment. *Id.* The foregoing math components are in P. Ex. 677 and P. Ex 1049.

[19] The "recent findings" which gave rise to the fire stopping additions were gleaned from CBC's expert, Al Schweickhardt's testimony. (Tr. Trans. 626:2-628:1)

$400,000 in loss of use damages, for a total award request of $12,800,000 during closing arguments. (Tr. Trans. 725:22-726:11).

CBC then used the original estimate extensively during closing argument – arguing to the jury that many of the parties responsible for many of the repair costs were no longer in the case and that that portion of Plaintiffs' damages should be ignored. Hence, there can be no doubt that the issue of setoff was argued to the jury, without objection by TCR. (*See* "Statement of Pertinent Facts", *supra*, Section D).

Importantly, the *Oaks* 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 who 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.

ii. TCR Tried Allocation to the Jury and the Jury Complied

TCR already received the setoff it seeks, because the way this case was tried allowed the jury to "reduce" any damages it did not attribute to TCR's conduct.

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 TCR to the jury. The jury understood the Project experienced multiple defects and damages, because the parties both introduced evidence, including expert testimony, photographs, and repair estimates, detailing the myriad of problems these 40 homeowners suffered. (*See, e.g.*, Pl. Exs. 677; 962-997; 1040-1043; *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).[20]

[20] To avoid repetition, Plaintiffs refer the Court back to "Statement of Pertinent Facts", *supra*, Section D, as well as to other sections in this brief, for more detailed factual references evidencing that setoff was tried to the jury.

In fact, at the 2019 trial, Plaintiffs took their original 2017 repair estimate, crossed out numerous items that no longer applied to the case being tried, and added repair costs for several additional defects which had arisen (including increased fire suppression repair costs). This revised estimate was marked for identification purposes only, but the foregoing details were put into evidence through the oral testimony of Plaintiffs' repair expert, Handegan. (P. Ex. 1049). The revised total repair cost published by Handegan was $13,428,000. (*Id.* at 592:9-11). Based upon this and loss of use testimony, Plaintiffs' counsel asked the jury for $12,800,000 in closing. (Tr. Trans. 725:22-726:11).

After so considering, the jury did exactly what Defense counsel asked it to do – It found TCR liable for its share, which it determined was $6,500,000. There is simply no basis for *additional* setoff under these circumstances. 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 plaintiff.

iii. Additional Setoff is Not Necessary to Provide Justice Between the Parties

Equity does not require additional setoff in this case because there has been no 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.").

CONCLUSION

In sum, this Court should find that TCR is not entitled to additional setoff because: the jury's verdict is roughly half of what the Association requested is not duplicative of any settlement funds received, is substantially less than the repair contractor attributed to TCR's scope of work, and, most certainly, does not amount to any windfall. To the contrary, any additional setoff of the damages the jury awarded the Association as a result of TCR's conduct would result in a windfall to TCR. *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, additional setoff is not required to provide justice between these parties because justice has been provided.

Respectfully submitted,

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August 26, 2020
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001790

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

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; 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 and John Doe 1-60, ... 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, Justin O'Toole Lucey, counsel for Respondents certify that the **RESPONDENTS' INITIAL BRIEF** was served on all other parties to this appeal on August 26, 2020, via email and by copy thereof deposited in the U.S. Mail properly posted for delivery to Andrew N. Cole, Esq., Collins & Lacy, P.C., Post Office Box 12487, Columbia, SC 29211.

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