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' INITIAL BRIEF

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September 15, 2020, Mount Pleasant, South Carolina

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2) **Has TCR met its burden to establish 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.

COUNTER-STATEMENT OF THE CASE

A.) Introduction and Pre-Trial Matters

This case concerns the construction of forty (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).[1] Defendants JMC Construction, LLC and JMC Construction, Inc. were dismissed by directed verdict at the close of Plaintiffs' case. (W-2 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. (W-2 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. (W-2 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.*[2] 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 (3) of the last four (4) 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

[1] The trial of this matter spanned two (2) weeks. All "Tr. Trans." cites are to Week One of the Trial, unless otherwise noted as "W-2" (referencing Week Two).

[2] 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. (W-2 Tr. Trans. 840:5-860:18; Verdict Form).

On May 28, 2019, TCR filed six (6) post-trial motions: (1) Judgment Not Withstanding the Verdict ("JNOV"); (2) New Trial Absolute; (3) New Trial *Nisi Remittitur*; (4) Motion Regarding Punitive Damages 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 Trial 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. [3] (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).

[3] 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* (May 28, 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 awarded zero damages against the fire sprinkler installer on this issue. (*See* Verdict Form).

On July 23, 2019, the Trial Court denied TCR's JNOV and New Trial Motions. (July 23, 2019, Form 4 Order). As for the Motion for Setoff, the Trial Court agreed with Plaintiffs' allocation and granted a setoff in the amount of $1,670,000, entering a total, final judgment against TCR of $5,330,000. *Id.*

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 Trial 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 alleged error in the Court's decision regarding setoff. (August 15, 2019, Pltfs' Memo in Opp'n to MTR).[4]

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.

[4] Because this motion included settlement amounts, which were confidential, Plaintiffs served this Motion and its Exhibit "A" on 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). The Trial Court accepted and considered this filing in reaching its final judgment.

(September 25, 2019, Order Denying TCR MTR at 3). Conversely, the Trial Court was persuaded by Plaintiffs showing that they had reduced their damages estimate and removed a number of defects from the jury's consideration. *Id.*

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"). (P. 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.* (W-2 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* (W-2 Tr. Trans. 425:2-25) (testimony from TCR's owner, Mark Poyner, regarding sub-standard work of his subcontractors); (W-2 Tr. Trans. 586:6-589:16; 591:10-16; 594:6-595:4) (TCR's siding installer's admissions regarding faulty siding installation); (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);

(Tr. Trans. 318:11-25) (testimony from homeowner, Kathleen Fitch, regarding shingles and siding blowing off the buildings). 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 from extensive pretrial proceedings (with extensive briefings from all Parties); 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." [5] (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

[5] TCR's repeated references to "agreed" issue releases is a misnomer as to TCR. Plaintiffs 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; *see, e.g.* Settlement Agreement and Mutual Release as to Builder Services Group, Inc. d/b/a Gale Contractor Services).

"removed from the trial of this case." (*Id*. at 33). There is a second category of eleven (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 (5) of these settlements, Plaintiffs concede only a partial setoff in order 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). In total, therefore, and accounting for the setoffs offered and/or conceded, Plaintiffs received $4,137,500 in pre-trial settlements for which no setoff is being offered or conceded.

There are five (5) settlements[6] and corresponding partial setoff amounts that TCR disputes: Atlantic (framing subcontractor), CBC (general contractor), H and A (framing subcontractor), Cohen (drywall and insulation subcontractor), and Novus (project architect). (Hereinafter, "Contested Settlements"). (*Id.* at 6-7). Four (4) of the five (5) 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.

i. Allocation of Insulation and Drywall Settlements

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 litigated, and Plaintiffs sought no damages related to insulation

[6] 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).

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.

ii. Allocation of Framer Settlements

Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. and H & A Framing Construction, LLC were the framing subcontractors at the Project. ("Framing Subcontractors"). The Framing Subcontractors' settlements, which totaled $1,200,000, covered two (2) principle issues: (1) shear walls;[7] and (2) window installation. Neither issue was presented to the jury, and neither was included in the damages sought at trial. (W-2 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.[8] 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. [9]

[7] A "shear wall" is a (vertical) wall with increased fastening and/or reinforcement to keep the building (stick) framing from being distorted (blown over) by winds (or other lateral forces).

[8] 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 were actually $1,200,000; therefore, the overlap setoff was in excess of 10%.

[9] The shear wall field reports by Britt Peters were listed as 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 (Jason McDonald and Seth Robertson) were listed as potential witnesses in the joint voir

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). This is a complete failure of evidence.

iii. Allocation of Novus Settlement

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).[10] 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 or professional negligence during contract administration; TCR's reference to 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). There was no expert testimony presented at trial to establish the architect's standard of care, their breach of standard of care, or that any theoretical but unproven professional negligence proximately caused any of the damages comprising the judgment against TCR. This was recognized by the Trial Court:

> 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

dire presented to the Court and jury. (Joint Voir Dire). TCR has the shear wall evidence and testimony and chose not to address it.

[10] 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; *see also* P. Ex. 542).

> 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. (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.

iv. 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 Settlement Agreement, July 10, 2018)

- 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's post-trial settlement was allocated on June 6, 2019, before the Trial Court entered final judgment against TCR. (CBC Settlement Agreement, June 6, 2019; 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). The Trial

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.

C.) Damages Presented at Trial

The way that this case was tried made it clear to the jury that the Project experienced multiple defects and damages, many of which were not to be included in their verdict. All Parties introduced evidence, including expert testimony, photographs, and repair estimates, detailing the myriad of problems these forty (40) homeowners suffered. (*See, e.g.*, P. Exs. 677; 962-997; 1040-1043). The jury was presented with at least five (5) different damage analyses during the May 2019 trial of this case: Plaintiffs' revised trial estimate; Plaintiffs' five (5) category breakdown of their trial estimate; Plaintiffs' outdated December 2017 estimate; and the original and revised defense estimates (W-2 Tr. Trans. 179:21-24).[11]

The jury heard from the Association's repair cost expert, licensed general contractor Jay Handegan,[12] 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

[11] 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).

[12] 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.

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).

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

> 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[13] 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.

(W-2 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 forty (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.

(W-2 Tr. Trans. 726: 11-25).

[13] At trial, TCR conceded that it and its subcontractor, Miracle, applied the trim around the windows – not the framer. (W-2Tr. Trans. 376:19-377:8).

In sum, Mr. Handegan removed $3,827,000 from his 2017 estimate (*see infra* fn. 23 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* (W-2 Tr. Trans.726:9-11; 726:23-25) *with* (P. Ex. 677). This reduction exceeds the amount of total settlements received prior to trial, $4,137,500, by approximately $700,000.

The verdict the jury ultimately returned is millions of dollars less than what the Association requested. *Compare* (Verdict of $6,500,000) *with* (W-2 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 included within settlements paid to Plaintiffs.

STANDARD OF REVIEW

As a matter of law, a non-settling defendant is only entitled to setoff payments made by a joint tortfeasor on the same claim for the same injury. S.C. Code § 15–38–50; *see also Smith v. Widener*, 397 S.C. 468, 471-2, 724 S.E.2d 188, 190 (Ct. App. 2012) ("A settlement by a joint tortfeasor reduces the claim against the other to the extent of any amount stipulated by the release or covenant. . . so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the non-settling defendant's right to setoff arises by operation of law.") (citations omitted) (emphasis added); *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). If setoff is not established as a matter of law, then it becomes a discretionary issue for the trial judge, who must assess the need for an equitable setoff.

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). 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.

The 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. at 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").

Under both standards here, the result is 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 three 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.

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 1) shows that 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.

A. 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 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 argues that each penny of the Contested Settlements was paid 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.* at 33, 35; *see also* Hrg. Trans. 35; 44-45). These statements are conclusory, lack evidentiary support, and do not make logical sense.

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.[14] 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 *Oaks*, for example, the South Carolina Court of Appeals recently addressed setoff in the construction defect context and its analysis considered the

[14] 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). This very general proposition is belied by, *inter alia*, TCR's concession that the issue removed claims are distinguishable and separable.

cost to repair different building components as different injuries. *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). 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 different than those addressed by settlement.

Because TCR is not entitled to setoff as a matter of law, the analysis must shift to an equitable one: has TCR shown that the Trial Court abused its discretion in applying an equitable setoff based upon the allocations proffered by Plaintiffs and supported by the trial of this case? The answer is no, TCR has not, nor did it make any such attempt.

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

The Association's allocation, the Court's approval of that allocation, and the resulting setoff of the verdict are reasonable, fair, and supported by both the record and South Carolina law. Importantly, Because TCR believes it is entitled to setoff as a matter of law, TCR does not proffer an alternative setoff 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). TCR does not explain in its brief *how* any of the settlements totaling the $4,180,000 additional setoff it seeks compensated the Association for the same injury as that tried to the jury, because it does not believe that it needs to do so. 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 and was this settlement for breach of warranty or professional negligence? TCR has realized that 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[15] 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 claim(s)* for the *same injury(ies)* as those tried to a verdict.[16] Since TCR already submitted its brief, it abandoned any chance it had to resuscitate its argument.

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.

(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; W-2 Tr. Trans. 725:22-726:25).

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[15] 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 alleged 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.").

[16] *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)

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).[17]

Separately, TCR has 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. For example, what evidence is there to show TCR is 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, the allocation was supported by what was and was not presented to the jury at trial:

[17] Additionally, and importantly, 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. 325:4-8; 555:20-24; W-2 Tr. Trans. 726:11-25).

- Deflecting floors: no evidence presented that the flooring needs to be removed and/or replaced at the Project. (W-2 Tr. Trans. 739:6-10; 740:10-14; 741:10-14).

- Window installation: no longer part of case, not litigated, and all window repair damages removed during closing argument. (W-2 Tr. Trans. 739:3-6; 740:20-22; 741:9-10).

- Shear Walls: not litigated or even mentioned during trial, and not in estimate. (P. Ex. 677).

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.[18] 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). Further, TCR has not shown any damages were proximately caused by the design professionals.

[18] Nor does TCR indicate what portion of the Architect's settlement payment would be properly allocated to the fire suppression damages, which were not included in the verdict. Indeed, the jury may have concluded the fire suppression damages were a result of design error or architect construction administrative oversight, rather than the installer's error; hence the defense verdict in favor of WC Services.

C. 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*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000). This is due, in part, 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). 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.

i. The Association's Allocation Was Timely

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).[19] 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 first settlement agreement with CBC was reached on July 10, 2018, approximately one (1) year

[19] The Trial Court called its July 23, 2019 Order its "final judgment." (September 25, 2019, Order Denying TCR MTR at 6).

before entry of the final judgment on July 23, 2019.[20] The post-trial 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 Agreements). The allocation was neither untimely nor was it improper. It simply did not benefit TCR.

ii. The Association's Allocation of CBC's Pre-Trial and Post-Trial Settlements Were Proper

TCR next argues that the Association's allocation was "improper", and the CBC settlements were actually "partial satisfaction[s] 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. 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).[21]

To the extent TCR argues that it is entitled to a 100% setoff of the contractually allocated CBC settlements because the settlements were 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" and would "place a nonsettling defendant in an advantageous position vis a vis settling tortfeasors." *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,

[20] TCR argues without legal support that $1,000,000 of CBC's settlement, which was paid one (1) year before 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).

[21] For example, CBC payed $125,000.00 to avoid an appeal of its share of liability on the fire suppression issues.

218 [1st Dept 1993]) (emphasis added). The *Daversa* court further observed that "[t]here is no justification for rewarding recalcitrant nonsettling defendants by 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*.

iii. South Carolina Law Does Not Allow A Settlement Allocation to Be Disturbed Simply Because It Benefits the Settling Parties

TCR asks this Court to reallocate and setoff CBC's two (2) settlements totaling $2,137,500 in their entirety just because the allocations to which Plaintiffs and CBC agreed 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.* Plaintiffs and CBC contractually allocated its two (2) settlements, which totaled $2,137,500. *See* (Statement of Pertinent Facts, Section B(iv), *supra*). Based upon this allocation, as well as the evidence presented at trial, the Trial Court provided TCR a $137,500 setoff to account for overlap of issues which were presented at trial. (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. Plaintiffs had the right to allocate the CBC payments to damage elements that were not TCR's shared responsibility. It did so, and TCR cannot unwind those allocations, having itself chosen not to settle with the Plaintiffs.

iv. 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 CBC'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 reckless, grossly negligent, or willful misconduct. (Verdict Form). TCR should get no credit for the $500,000 punitive damages award levied against CBC. TCR argues that CBC's payment of the punitive damages awarded against it absolves TCR of the responsibility to pay for its egregious conduct. The law does not afford TCR the luxury of escaping the punitive damage judgment imposed upon it where, as here, a co-defendant paid the punitive damages the court separately imposed upon that Defendant.

D. TCR's "Verdict Form" Arguments Are Without Merit and Do Not Save its Failure of Proof

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. (May 3, 2019, 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. (W-2 Tr. Trans. 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.

E. 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 any overlap between pre- and post-trial settlements and the jury's verdict. 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). Contrary to this assertion, 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. 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).[22]

In *The Oaks at Rivers Edge Property Owners Ass'n, Inc. v. 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.*

[22] To the extent this Court alters the holdings from *Oaks*, *Riley*, and/or other decisions relevant to the issue of setoff in the context of multi-party tort litigation upon which Plaintiffs relied when pursuing, resolving, and trying this case, fairness requires that any such alteration should be applied prospectively. *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018) ("Nevertheless, fairness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law [interpreting the statute].").

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 *Oaks* removes the notion that such a task is impossible and therefore automatically requires a setoff.

Subsequently, the *Oaks* 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 *Oaks* 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 Peas Island 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.[23] Handegan removed $3,827,000 in resolved items from his trial estimate,[24] initially reducing the original damages to $11,431,000. He thereafter added back $789,394 in additional

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

[24] Handegan removed $98,672 for labor, $40,210 for material, and $2,821,880 for subcontracts. (P. 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 adjustment per the estimate 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 P. 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.

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).[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. Trans. 591:8-592:17). CBC and TCR had Handegan confirm many of the 2017 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 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. (W-2 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 $4,137,500 pre-trial settlements for which no setoff was offered. Like it did in *Oaks*, this Court should find that the Plaintiffs' self-imposed reduction in damages, coupled with the Trial Court's reasoned further reduction of the verdict, satisfies the principles underlying setoff at law and in equity. 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, if not completely abolished.

[25] 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)

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

The parties at trial, including TCR, effectively tried the issue of allocation/setoff to the jury, thereby ensuring Plaintiffs did not receive a double recovery.

In *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997), this Court confronted a scenario in which a circuit court awarded a setoff based upon how the case was ultimately presented at trial. 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 <u>should have been pled, we would have held the issue tried by implied consent pursuant to Rule 15(b), SCRCP.</u>

(*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.); *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).[26]

Here, like *McCurry*, the damage allocation was tried by TCR to the jury. 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 into evidence by Defendant CBC and was not objected to by TCR. (P. Ex. 677; Tr. Trans. 600:1-25). 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. (P. Ex. 677; W-2 Tr. Trans. 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). 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 certain portions of Plaintiffs' damages

[26] 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 damage reduction was tried to the jury.

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).

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. (W-2 Tr. Trans. 755:5-13). TCR's counsel used the word "architect" six (6) times; "engineer[]" three (3) times; and mentioned at least three (3) other parties, who were named parties but were absent from trial, by name and/or role. (W-2 Tr. Trans. 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. (W-2 Tr. Trans. 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 issues and damages removed from the case by prior settlements.

After considering the evidence as summarized by the Parties in closing arguments, 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 where, as here, a defendant asks the jury to limit its liability after introducing evidence of other parties, other problems, and other settlements. In this circumstance, the court should not further set off a verdict that a defendant already argued to the jury should be reduced because other people previously paid settlements to the plaintiff.

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

As detailed *ad nauseum* in the preceding argument sections, 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.").

To underscore the point that there has been no double recovery, anticipating a potential need for allocation by trade/Defendant, Plaintiffs' counsel asked Mr. 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 presented at trial was 60-65%; 62.5% of $13,428,000 is $8,375,000 attributed to TCR's scope of work by Plaintiffs' repair expert. Given that the final

judgment entered by the Trial Court against TCR totaled $4,830,000 in actual damages, there has been no double recovery.

CONCLUSION

TCR has failed to meet its burden of proving that the Trial Court abused its discretion in ordering a setoff of $1,670,000.00, nor has TCR proved that the net judgment against it amounts to a double recovery by the Plaintiffs. 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."). Further, to hold otherwise 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.

Simply put, additional setoff is not required to provide justice between these parties because justice has already been provided through the exercise of the Trial Court's discretion upon the record before her.

Respectfully submitted,

By: /*s/Justin O'Toole Lucey*

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September 15, 2020

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Sep 15 2020
SC Court of Appeals

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 September 15, 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.

Respectfully submitted,

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September 15, 2020
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