THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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

vs.

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

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

and

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

FINAL RESPONSE BRIEF OF APPELLANT

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UNCONTESTED RELEVANT FACTS

There is no dispute that Complete Building Corporation ("Complete") and Tri-County Roofing, Inc. ("TCR") were assessed the same judgment at trial: a joint and several general verdict of $6.5M plus an assessment of $500k punitive damages against each. [Judgment]. Eloy Alonzo Vasquez ("Vasquez") and Miracle Siding, LLC ("Miracle") were assessed their relative percentages of fault as determined by the jury pursuant to S.C. Code § 15-38-15. [Id.]. The jury rendered its verdict on May 16, 2019. [Id.]. The format of the jury verdict form was contested. The trial judge used the verdict form proposed by Respondent. The formats proposed by the defendants at trial included various ways to allocate responsibility between the defendants.[1] The trial judge explicitly noted that the objections and challenges to the verdict form were preserved:

> MR. REESER:[2] Your honor, I would just restate our objection earlier as to number 3. Again, our claim is that this is not an indivisible injury. Because of that, we'd request that the jury be asked to make a damage award, actual damages as to each defendant.
>
> THE COURT: All right, objection noted for in the record.
>
> MR. REESER: Thank you, Your Honor.
>
> THE COURT: I think we have you all numerous times on this joint tortfeasor issue, so you are well protected for purposes of the record on that issue. Everybody is.
>
> MR. COLE: That's just – I'm jointly joining in the ---
>
> THE COURT: Yes.

[1] Like many exchanges during the course of the trial, the proposed verdict forms were shared by the parties with each other as well as with the court via email. [R. 1877-1911 E-mail correspondence with court regarding verdict forms on May 14 and 15, 2019]; and see R. 684-685 Wk-1 Trans p.115, ln.23—p.116, ln.21 (trial judge requests proposed verdict forms); R. 1596 Wk-2 Trans p.669, ll.14-21 (trial judge acknowledges receipt of some proposed verdict forms); R. 1607-1614 Wk-2 Trans p.680, ln.16—p.687, ln.14 (other proposed verdict forms); R. 1620-1622 Wk-2 Trans p.693, ln.5—p.695, ln.11 (additional arguments regarding proposed verdict form); and R. 1624-1626 Wk-2 Trans p.697, ln.3—p.699, ln.12 (trial judge picks the verdict form to use).

[2] Attorney for Vasquez and Miracle.

MR. COLE: --- joint tortfeasor thing. Your Honor.
THE COURT: Absolutely

Wk-2 Trans p.698, ln.18—p.699, ln.7. [R.1625-1626.]

TCR and Respondent agree that the jury was informed that it was not to include in its deliberations issues that include the work related to HVAC, window product, fireplaces,[3] grading and paving, interior flooring, interior trim, and concrete. These items are called "issue releases" in TCR's Initial Brief. Respondent referred to them as "resolved claims" at trial. [R.678 Wk-1 Trans p.109, ln.17]. This is consistent with Respondent's pre-trial brief stating that "[d]efects in the following narrowly defined areas have been eliminated from the case through settlement: HVAC and electrical (cost of framing work to facilitate access to the HVAC equipment remains in the case), driveways, fireplaces, and window manufacturing defects (but not cost of removal and reinstallation of the windows—which remains in the case.)" [R.1854-1876 Plaintiff's Pre-Trial Brief]. This same list of resolved claims, a/k/a issue releases, was relayed to the trial judge. [R.681-682 Wk-1 Trans p.112, ln.9—p.113, ln.12].

The issue releases are the same things that Mr. Handegan crossed out in his revised repair cost estimate dated May 7, 2019 [R.2993-3003 Pl Ex. 1049] and testified in his direct examination at trial were removed from his figures. [R.950-955 Wk-1 Trans p.591, ln.14—p.596, ln.5]. These issue released items are not included in TCR's setoff calculations. Notably, none of the settlements that TCR argues are proper for setoff are crossed out on Mr. Handegan's repair estimate. [R.2993-3003 Pl Ex. 1049]. In fact, Mr. Handegan added in *additional costs* including an additional 10% contingency in his revised estimate. [Id.]. However, the first time that Respondent argued that the

[3] TCR acknowledged in its Initial Brief that the settlement with Gale Contractor Services regarding the fireplaces should be included in the issue released items.

non-issue released settlements should be excluded from setoff, in whole or in part, was *after* the jury verdict. [R.1814-1845 Post-Trial Hearing Trans pp.29-60].

TCR and Respondent agree that the settlements paid by or on behalf of Complete, Creekside, Inc. (painter), Atlantic Building Construction Services, Inc. (framing), H and A Framing Construction, LLC (framing), Novus Architects, Inc. (architect), CertainTeed Corporation (roof and siding manufacturer), Cornerstone Construction (siding), Miracle (siding), Vasquez (roofing and waterproofing), Stanley's Vinyl Fence Designs (exterior railings), and Cohen's Drywall (drywall) should be used, in whole or in part, to setoff the jury verdict against TCR. The dispute is over the total amount of setoff to be assigned. Respondent states in its brief that TCR should suggest an alternative percentage or allocation. TCR submits that it has consistently argued that 100% of the non-issue released settlements should be used to setoff the jury verdict. [R.1814-1845 Post-Trial Motion Trans pp.29-60; R.525-545 TCR Post-Trial Motion; R.620-631 TCR Motion to Reconsider; R.649-660 TCR Return; TCR's Appellate Brief].

TCR and Respondent also agree that some testimony regarding the responsibility and potential culpability of the architect, framers, drywall installer, and the other parties that settled before trial was presented to the jury. [TCR's Initial Brief pp.6-20]. Stated another way, the parties acknowledge that the defendants used the empty chair defense at trial.

On May 28, 2019, TCR was required to file a motion to compel production of the settlement agreements between Respondent and the various settled parties. [R.546-574 Mot. to Compel Settlements]. On Thursday, June 6, 2019, the evening before the post-trial motions hearing with the trial judge, Respondent produced the covenant not to execute with Complete [R.1918-1924 Complete Covenant 7/10/2018], sixteen settlement agreements [R. 1925-1939 Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement

4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2010-2018 Novus Settlement 2/22/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2049-2056 Kelly Flooring Settlement 1/25/2019; R.2057-2064 Cornerstone Settlement 4/25/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2089-2091 Alderman Settlement 6/19/2018; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018; R.2131-2142 H&A Settlement 1/31/2018], and two settlement e-mail chains [R.2122-2130 Moseley Settlement May-June, 2019; R.2143-2145 Andersen Settlement April 30, 2019] representing all settlements reached at that time.[4] The executed settlement agreements include language that the settlement is for the complete dismissal of all claims, known or unknown, that could have been brought in the litigation. The settlement agreements entered with Complete, Creekside, ARS, Atlantic, Gale, Tallent, CertainTeed, Miracle, Vasquez, Stanley's, and Cohen's include a specific reference to damages for, *inter alia*, loss of use. [R.1925-1939 Complete Settlement 6/6/2019; R.1940-1954 Creekside Settlement 6/6/2019; R.1955-1979 ARS Settlement 4/23/2019; R.1980-1994 Atlantic Settlement 4/5/2019; R.1995-2009 Gale Settlement 7/24/2018; R.2019-2033 Tallent Settlement 2/22/2019; R.2034-2048 CertainTeed Settlement 7/12/2018; R.2065-2076 Miracle Siding Settlement 5/28/2019; R.2077-2088 Vasquez Settlement 5/28/2019; R.2092-2106 Stanley's Settlement 5/8/2019; R.2107-2121 Cohen's Settlement 7/12/2018]. The only settlement agreement that includes an allocation of settlement funds is the one with Complete dated June 6, 2019. [R.1925-1939 Complete Settlement 6/6/2019]. The Complete settlement

[4] TCR understands that Respondent reached a settlement with JMC Construction sometime around July of 2020. JMC Construction started at trial but was dismissed after the conclusion of Respondent's case in chief. Respondent appealed. The Order for *Remittutur* from the Court of Appeals for Appellate Case No. 2019-001520 that dismisses Respondent's appeal against JMC Construction was signed by the Clerk for the Court of Appeals on July 28, 2020, and the same was filed with the Charleston County Clerk of Court on August 26, 2020.

agreement was entered twenty-one (21) days after the jury handed down its verdict. It also includes an allocation, for the first time, of the settlement funds received from the covenant benefitting Complete. [Id.].

ARGUMENTS IN REPLY

The trial court undervalued the amount of setoffs from prior settlements for issues that were presented as damages to the jury. The damages sought and awarded were to reimburse Respondent for the cost to repair the Palmetto Pointe project and for lost use during these repairs. These damages all arose from the same factual scenario and are properly construed as the same damages. See Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (finding a claim against an employee benefits provider was for the same injury for the damages sought against beneficiaries charged with improperly removing funds from the employee benefits account, thus setoff was applied); Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 209-210, 662 S.E.2d 444, 451 (Ct. App. 2008), reh'g den. (June 26, 2008) (noting that setoff was proper for causes of action for aiding and abetting a breach of fiduciary duty and tortious interference with contract because the damages "arose out of the same factual scenario."); Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999) (pointing out the claims against Richland Memorial and Dr. Oliver "arise out of the same factual scenario" and that the plaintiff "confuse[d] the concept of damages within the meaning of the word injury as used in [S.C. Code § 15-38-50]."); accord Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20, 29 (Dist. Ct. App. Fla. 1997), reh'g den. (March 11, 1998) (allowing setoff of prior settlements paid by an architect and a concrete and masonry construction company to a judgment against the construction manager because "the damages were not separate and distinct" and the setoff prevents a double recovery for the plaintiff).

1. The entire settlement between Respondent and Complete should be used as setoff

In its Brief, TCR discussed at length how it was not the only defendant at trial and how Complete was found jointly and severally responsible for the same general verdict. Stated more succinctly: TCR and Complete were joint tortfeasors. They were assessed the same joint and several verdict of $6.5M by the jury. Moreover, Respondent considers them joint tortfeasors because it seeks to recover the $500,000 punitive damages assessment from both TCR and Complete. See Harris v. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973) ("It is of course elementary in this jurisdiction that punitive damages are allowable in tort actions…."). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, section 15-38-50 grants the court no discretion…in applying a set off." The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 437-438, 803 S.E.2d 475, 482 (Ct. App. 2017), reh'g den. (Oct. 19, 2017) (quoting Widener, 397 S.C. at 472, 724 S.E.2d at 190 (internal quotations omitted)); see also, Lloyd's, Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (the amount of damages recoverable against the non-settling tortfeasor is reduced by the total amount of consideration paid for a release of a joint tortfeasor); Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 596 (4th Cir.1996) ("Under South Carolina law, a non-settling defendant is entitled to a pro tanto reduction of a judgment in a same cause of action.").

As argued in its Brief, TCR maintains that Respondent's allocation of the settlement monies was untimely. The only settlement agreement with an allocation was the settlement with Complete that was signed on June 6, 2019. This was entered *after* the jury returned its verdict on May 16, 2019. A common fact shared by published setoff cases in South Carolina is the proposed allocation was disclosed *before* the jury rendered its verdict. See Riley v. Ford Motor Co., 414

S.C. 185, 777 S.E.2d 824 (2015) (Settlement allocation was approved by the court prior to the commencement of trial.); Rutland v. SCDOT, 400 S.C. 209, 734 S.E.2d 142 (2012) (Affirming the Court of Appeal's decision in Rutland v. SCDOT, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), reh'g den. (Oct. 29, 2010), cert. granted (Oct. 19, 2011), that a settlement allocation that was approved by the court prior to trial was properly re-allocated for setoff after trial because there was no evidence supporting damages for a survival claim.); Widener, 397 S.C. 468, 724 S.E.2d 188 (Settlement reached at start of trial and the proposed allocation disclosed before the conclusion of trial; moreover, the appellate court found the claims for actual and punitive damages arose from the same injury and were subject to setoff.); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), reh'g den. (Nov. 4, 2000) (Settlements were allocated between survival and wrongful death claims prior to trial against Dr. Epstein, and because Dr. Epstein was not a party to the settlement agreement and because there was no evidence at trial in support of damages for a survival claim, the court properly re-allocated the setoff.); Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (Settlements were allocated between survival and wrongful death claims prior to trial against Dr. Epting.).

2. Punitive damages can be the subject of setoff.

The South Carolina courts have already determined that "when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury [and are subject to setoff]." Widener, 397 S.C. at 472, 724 S.E.2d at 191. In this case, the jury awarded the same general verdict against Complete and TCR for $6.5M actual damages and $500k punitive damages. As discussed above, these damages all arise out of the same injury for construction defect repairs and lost use. TCR is not being relieved of its obligation to pay the punitive damages verdict assigned against it.

Respondent's reliance on McGee v. Bruce Hosp. System, 344 S.C. 466, 545 S.E.2d 286 (2001), reh'g den. (May 14, 2001) is misplaced. McGee is a medical malpractice case where the court found a physician that was improperly dismissed from trial could still be deemed liable for his willful and wonton conduct by the jury in a second trial. Prior to the retrial of the case, the co-defendant physician settled. The settlement covered all the actual damages. The court found the retrial against the non-settling physician could go forward, but the petitioner must prove that the non-settling physician is liable for actual damages and "[a]t the conclusion of the trial, if the jury has found respondent liable for actual and punitive damages, then the trial court will strike the award of actual damages given the fact that petitioner's actual damages have already been satisfied by [the first physician]." See Id. at 472. McGee prevents a plaintiff from getting a double recovery of their actual damages.

3. TCR's setoff calculations have been consistent.

Respondent contends that mathematical errors exist in TCR's brief.[5] TCR notes that the source data that was articulated most succinctly during the post-trial motions arguments on June 7, 2019 [R.1809-1845 Post-Trial Hearing (6/7/2019) pp.24-60] and summarized in the spreadsheet used at this hearing [R.1914-1917 E-mail 6/10/2019] remain the same.

TCR filed its post-trial motions on May 28, 2019. [R.525-545 Post-Trial Motion]. At that time, TCR was not aware of the total settlements reached in the case because Respondent had not produced the settlement agreements. TCR did not include the issue released settlements in its

[5] To the extent some arithmetic is incorrect, TCR will petition the court to allow the correction of inadvertent mathematical errors pursuant to Rule 211(b)(2), SCACR. Moreover, To the extent that TCR's pre-trial settlement numbers included in its initial brief in Section II, these are hypothetical calculations raised in conjunction with TCR's discussion of The Oaks, supra. These figures were not intended to suggest a specific setoff amount.

calculation, but it concluded *based on the information known at the time* that the judgment against TCR should be revised from $7,000,000 to $2,227,500.

TCR received the settlement agreements the evening before the post-trial motions hearing held on Friday, June 7, 2019. The issue released settlements for HVAC, window product, grading and paving, interior floors, interior trim and railings, and concrete total $1,385,000. TCR did not include the fireplace settlement in the issue releases at the post-trial motions hearing; albeit, TCR acknowledges in this appeal that the fireplace settlement of $22,500 should be included with the issue released settlements. The total setoff number TCR argued at the post-trial motions hearing was $5,415,000, resulting in a revised verdict amount of $1,585,000. However, if TCR had included the fireplace settlement adjustment at the post-trial motions hearing, then the applicable setoffs would total $5,392,500, resulting in a revised verdict amount of $1,607,500.

TCR's motion to reconsider filed August 5, 2019 [R.620-631 Motion to Reconsider Form 4 Order filed July 23, 2019] and Return to Respondent's memorandum opposing the motion to reconsider filed August 26, 2019 [R.649-660 Return to Memo Opposing Motion to Reconsider] repeat the figures argued at the post-trial motions hearing. Again, had TCR recognized the fireplace settlement should be characterized as an issue release, then the total setoffs would have been articulated as $5,392,500, resulting in a revised verdict amount of $1,607,500. Correctly adding the settlements discussed in TCR's initial brief yields the same result.

4. TCR preserved its objections to the general verdict form that was adopted by the court. Moreover, Respondent cannot invade the province of the jury to support its arguments.

Respondent argues on page twenty-six of its brief that TCR waived its reference to the jury verdict form. Every party still in the trial when the jury started its deliberations had submitted a proposed jury verdict form to the trial judge via email. [See Uncontested Relevant Facts, supra.]. However, the trial judge adopted the format submitted by the Respondent. [R.1624-1626 Wk.2

pp.697—699]. This jury verdict form asked the jury to render a general verdict—that is, the jury could either render a defense verdict or it could fill in a single number for an award of actual damages. [R.116-122 Verdict].

Respondent cannot now try to interpret or speculate what the jury included in its general verdict of $6.5M. The courts are wary of invading the province of the jury and "will not speculate as to how the jury allocated damages." Jenkins v. Few, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), reh'g den. (Feb. 28, 2011), cert. granted (Feb. 13, 2012) ("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages."); see, e.g., Kennedy v. Richland Cty. Sch. Dist. Two, 428 S.C. 98, 119, 833 S.E.2d 414, 425 (Ct. App. 2019), reh'g denied (Oct. 24, 2019), cert. dismissed (Mar. 9, 2020) (when entertaining a motion for a new trial *nisi*, there must be "compelling reasons to justify invading the province of the jury"); Stanton v. Southern Ry. Co., 56 S.C. 398, 34 S.E. 695 (1900) (noting it would be improper for the trial judge to interject his opinions into the jury charge as this would invade the province of the jury). It is the court's duty to enforce a verdict, not make it. Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC, 425 S.C. 276, 302, 821 S.E.2d 509, 522 (Ct. App. 2018), reh'g den. (Dec. 13, 2018), cert. granted (Aug. 6, 2019) (citing Joiner v. Bevier, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930)). The record does not include any evidence of what was included in the jury's verdict. However, there is ample evidence of the issue release items that were explicitly *excluded* from the jury's deliberations. It is improper for Respondent to attempt to separate everything that was included in the general verdict. See D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 442 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018) (citing Jenkins, 391 S.C. at 221, 705 S.E.2d at 463) ("The record is devoid of any

evidence presented to the arbitrator, and any attempt to devine the reasoning of the arbitrator's [general verdict] award would be an exercise in speculation.")

TCR submits that after the HVAC, fireplace, paving, interior flooring, interior trim and railing, concrete, and window products issues were removed from the jury's deliberations—i.e., the issue releases—what was left over was everything else. Respondent claims it should be able to limit the setoff from the settlements from Complete, Atlantic (framing), H&A (framing), Cohens (drywall), and Novus (architect), but Respondent does not point to any facts in the record in support its calculations. For example, Respondent claims that 50% of the Cohens settlement should be applied to insulation repairs and 50% to drywall repairs. No facts support this split. The Cohens settlement advocates no such split. This is merely an arbitrary number assigned by Respondent to this claim. Allowing parties to indulge in "manipulative attribution of settlement amounts… would compromise South Carolina's policy of permitting setoffs to ensure against multiple recovery for the same injury." Atlas, 99 F.3d at 596.

5. Setoff is not a jury question.

Setoffs of prior settlements against a jury verdict is an issue for the trial judge. There cannot be a setoff until the jury renders its verdict. See Rutland, 390 S.C. at 83, 700 S.E.2d 454. It is incumbent on the court to apply the statutory mandated setoff post-verdict because setoff is not a matter properly triable to the jury. Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995).

Moreover, South Carolina recognizes that asserting the empty chair defense at trial does not waiver the right to seek setoff of prior settlements. The South Carolina Supreme Court explains in Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017) that the legislative purpose of the South Carolina Contribution Among Joint Tortfeasors Act was to strike a balance of fairness between plaintiffs and defendants.

> Specifically, the Act sets forth in section 15-38-15(B) and (C) a detailed method for apportioning fault "among defendants." Further, and perhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts.

Tiffany at 557, 799 S.E.2d at 484 (citing Widener, 397 S.C. at 472, 724 S.E.2d at 190 and referencing that "a nonsettling defendant's right to setoff arises by operation of law, and it is not within the discretion of the trial court to apply setoff"). The court further clarified the trial procedure in Machin v. Carus Corp., 419 S.C. 527, 799 S.E.2d 468 (2017). In Machin, the Supreme Court of South Carolina found that a defendant chemical manufacturer at trial had a right to inform the jury about the culpability of the Town of Lexington, even though the Town could not be held liable due to the preclusive effect of the Worker's Compensation Act. The court explained:

> A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established "empty chair" defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries. Of course, the employer cannot be found to be the proximate, or legal, cause of the plaintiff's injuries because the employer is immune from tort liability under the exclusivity provision of the South Carolina Workers' Compensation Act. By enacting the exclusivity provision, the legislature has already determined that the employer may not be legally responsible in tort for the plaintiff's injuries.
>
> This is not to say, however, that the employer cannot be found by the fact-finder to have been responsible for the plaintiff's injuries. If the rule were otherwise, the defendants would effectively be precluded from presenting a defense. A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Machin at 542-543, 799 S.E.2d at 476. Respondent's arguments are incorrect that somehow the empty chair defense causes the defendants to waive their right to setoff or that it should be construed as an already applied credit. The jury is only able to allocate fault among the parties at trial, and the total percentage of fault attributed to the plaintiff and to the defendants at trial must be one hundred percent. See Tiffany at 560, 799 S.E.2d at 485 (citing S.C. Code § 15-38-15(C)(3) and Machin).

6. Respondent's reliance on foreign case law supports TCR's position.

Respondent attempts to use post-verdict allocation of prior settlements in an attempt to inflate a jury verdict that Respondent wished was higher. Respondent then cites cases from Florida, Arizona, Texas, and New York for the proposition that "settlement dollars are not synonymous with damages and instead include the value of avoiding the risk and exposure of trial and appeal." [Respondent's Brief p.23]. Respondent adds that the "recalcitrant non-settling defendant" should not be rewarded by the prior settlements reached in the case. [Respondent's Brief p.24]. However, these conclusions from the foreign cases are taken wholly out of context and a close reading of these cases actually supports Appellant's argument that Respondent's proposed allocation is incorrect.

As an initial matter, the foreign cases can be distinguished in part because they apply contribution and setoff law different from the law in South Carolina. Florida, Arizona, Texas, and New York ask the jury to allocate a percentage of fault between all of the defendants and possible defendants in the case. A defendant is only responsible for paying its allocated percentage of fault for a plaintiff's injury; therefore, the plaintiff's injury is first reduced by prior settlements and then the non-settling defendant's percentage of fault is applied. This method ensures that the defendants are only ultimately responsible for their relative percentages of fault. The courts explain that the

non-settling defendant takes on the risk that the allocated percentage of fault of the settled defendants will be less than the net settlement funds paid, leaving the non-settling defendant with a higher percentage of the judgment to pay. The plaintiff takes on the risk that the jury may cap the non-settling defendant's relative percentage of fault in an amount lower than will fully compensate the plaintiff because the settled parties should have paid more. See, generally, Daversa v. P.T.C. Properties, Inc., 599 N.Y.S.2d 432 (Civ. Ct. NY 1993); Matter of New York City Asbestos Litigation, 188 A.D.2d 214 (N.Y.App., 1st Dept. 1993); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex.1984), reh'g den. (March 28, 1984); Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla.1995), reh'g den. (Aug. 24, 1995); and Neil v. Kavena, 859 P.2d 203 (Ct. App. Ariz. 1993).

South Carolina does not follow this relative percentage of fault allocation for all parties. See S.C. Code §15-38-15. South Carolina suspends joint and several liability only for those parties deemed to be less than fifty percent of the total fault by the jury, and these defendants are only responsible for the percentage allocated by the jury. S.C. Code Ann §15-38-15. Indeed, this was why the judgments against Miracle Siding and Vasquez were capped at five percent each of the $6.5M general jury verdict. But South Carolina only allows the parties still at trial to be included on the jury verdict sheet and subject to a percentage allocation of fault. See Tiffany, 419 S.C. at 560, 799 S.E.2d at 485.

Nonetheless, the policy arguments and equities raised in the foreign cases would support TCR's position in this appeal. In Daversa, the jury determined that the non-settling defendant at trial was 30% responsible for the total verdict. Id. at 433. The non-settling defendant then sought application of both the percentage of fault as well as apply a statutory cap on awards of future damages. It is in this context that the Daversa court found that the "recalcitrant nonsettling

defendant[ ]" was not able to take advantage of the cap on damages as well as the percentage allocation of fault. Id. at 434. Importantly, the court notes that the non-settling defendant is responsible for no more than its allocated percentage of fault for, assuming, *arguendo*, that the credit is applicable, "any credit provided to a nonsettling defendant has no defensible purpose beyond that of assuring that the nonsettlor will not be accountable for more than its equitable share of the verdict." Id. at 434-435 (citation omitted).

The second New York case cited by Respondent is Matter of New York City Asbestos Litigation. The question addressed by the court is when setoffs should be applied in the post-verdict adjustment period. This matter involved over 600 asbestos cases against 40 named defendants that were aggregated together, resulting in a large jury verdict. Id. at 217.The court found the "aggregate method" was the best methodology. Id. at 222. Under this method, the jury verdict is first reduced by the total value of all prior settlements reached and then the relative percentage of fault is applied. "The purpose of allowing a nonsettling defendant credit for releases obtained by settling defendants is merely to ensure that a tortfeasor who proceeds to verdict is not held responsible for more than his equitable share of the plaintiff's damages subject, of course, to the doctrine of joint and several liability." Id. at 218 (citation omitted).

The Texas case cited by Respondent addresses whether a products liability action based on strict liability should be reduced by comparative negligence by the co-defendants and the plaintiff. See Duncan, 665 S.W.2d at 418. The Texas court provides a lengthy analysis that explains why it was adopting a common law procedure to ensure that a defendant would only be responsible for its relative percentage of fault as determined by the jury. Id. at 427 ("Judicial adoption of a comparative apportionment system, independent of statutory comparative negligence, is a feasible and desirable means of eliminating confusion and achieving sufficient loss allocation in strict

liability cases. Accordingly, we hereby adopt such a system.") Respondent quotes the language that "settlement dollars are not the same as damages" [Respondent's Brief p.23] to argue that setoff is improper. However, the Texas court noted that the setoff is applied to the total verdict and then the non-settling defendant's percentage allocation is assessed. Texas applied the "one recovery rule," which is similar to the law in South Carolina that a plaintiff is not entitled to double recovery for the same damages.

> For the reasons stated, we hold that the one recovery rule does not prevent our adopting a system that reduces the plaintiff's recovery and the non-settling defendants' liability by the percentage of causation assigned to any tortfeasor with whom plaintiff has settled. We hereby adopt a percent credit rule, which will leave defendants unaffected by settlements in which they do not participate. Each party's share of liability will be determined by the jury. Plaintiffs will benefit from good settlements and bear the risk of bad ones, just as they do in single-tortfeasor cases. Allowing plaintiffs to keep the excess form a good settlements [sic] may violate the one recovery rule, but no one is harmed.

Duncan at 432. The Duncan case was further clarified in a case titled Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101 (Tex.2018), reh'g den. (Sept. 28, 2018). The court in Sky View discussed the rationale of the one-satisfaction rule in a lawsuit brought by a lender against a borrower and personal guarantors of the debt. Notably, the court found that the damages sought in the lawsuit were for the same claim against all of the defendants. See Id. at 105 (noting that plaintiff was only seeking one damages question for the sum of money to fairly and reasonably compensate it for damages caused by the actions of the defendants). Texas is similar to South Carolina in that a plaintiff is only entitled to one recovery for one injury. Compare Sky View at 107 ("It is a rule of general acceptation that an injured party is entitled to but one satisfaction for the injuries sustained by him…. There being but one injury, there can, in justice, be but one satisfaction for that injury" (citations and reference to Duncan omitted)); with Rutland, 400 S.C. at 216, 734 S.E.2d at 145 ("Allowing this credit prevents an injured person from obtaining double recover for the

damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.") (internal quotations and citations omitted). "The plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settling defendant has already partially contributed. The plaintiff would otherwise be recovering an amount greater than the trier of fact has determined would fully compensate for the injury." Sky View at 107 (citation omitted). In fact, Texas holds that it is the *plaintiff that ultimately bears the burden of proving a reduced setoff amount*.

> A nonsettling defendant seeking a settlement credit under the one-satisfaction rule has the burden to prove its right to such a credit. In [Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 927 (Tex. 1998)], we held that a nonsettling defendant meets this burden by introducing into the record either the settlement agreement or some other evidence of the settlement amount. Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award would not provide for the plaintiff's double recovery. A written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden.

Sky View at 107-108 (internal citations and quotations omitted). The Texas court expounded:

> A nonsettling party should not be penalized for events over which it has no control. Thus, this burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff's settlement, is appropriate because the plaintiff is in the best position to demonstrate why rendering judgment based on the jury's damages award would not amount to the plaintiff's double recovery. If the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire settlement amount. We review the trial court's application of the one-satisfaction rule de novo.

Id. at 108-109 (internal citations and quotations omitted).

In Sky View, case the court found that plaintiff never offered evidence regarding allocation of the settlement proceeds and, therefore, he failed to rebut the presumption that the

non-settling defendant was entitled to setoff the full amount of the prior settlements. See Id. at 111. Under this framework, TCR notes that Respondent did not provide allocations for any settlements except the post-verdict settlement agreement with Complete. If we were in Texas, Respondent would not meet its burden. Although Respondent eventually provided possible percentages for allocating the settlements with Atlantic, H&A, Novus, and Cohens, there is no evidence in the record to justify the proposed allocations. See Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (Arguments of counsel are not evidence) (citations omitted). Respondent provides no basis for the proposed allocations that were first disclosed on Monday, June 10, 2019, other than they are numbers Respondent will accept.

Respondent also references a Florida wrongful death case, Tallahassee Memorial, for the proposition that settlement dollars and damages are not interchangeable. Again, this language is taken out of context. Florida requires the jury to determine the relative percentages of fault of *all* potential parties, even those not at trial, so that the individual defendants will not be responsible for more than their proportional percentage of fault. See Tallahassee Memorial at 251 (Referencing the seminal case of Fabre v. Marin, 623 So.2d 1182 (Fla.1993) for the explanation that "each defendant should pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident. In order to do this, it is necessary to determine the percentage of fault of all entities who contributed to the accident regardless of whether they are joined as defendants."). Moreover, the Florida court found that the settlement agreement that attempts to apportion the settlement funds is not dispositive on the amount of setoff. See Fabre at 254 ("[A] private unilateral agreement among several plaintiffs to apportion funds paid by one joint tort-feasor is not binding upon the non-settling joint tort-feasors and the courts in determining

the claim of the non-settling joint tort-feasors."). Indeed, the Florida court warns against allowing a plaintiff to merely proclaim an allocation:

> To permit the settling parties to control the allocation between economic and noneconomic damages would invite collusion between plaintiffs and settling defendants. That is, plaintiffs would necessarily seek to maximize the amount of the settlement apportioned to noneconomic damages because none of this amount would be set off against the jury verdict of noneconomic damages. At the same time, it would make no difference to the settling defendants, so they could be expected to be amenable to such apportionment in order to settle the case and even reduce the total amount required to settle.
>
> A fairer solution is to have the allocation based upon the jury verdict. Thus, we hold that the settlement proceeds should be divided between economic and noneconomic damages in the same proportion as the jury's award.

Tallahassee Memorial at 254 (internal citations omitted). Therefore, the Florida court reduced the noneconomic damages award against the non-settling defendant at the same percentage as the ratio of the economic damages award compared to the total award. Stated another way, the Florida court ensured that the non-settling defendant was not found responsible for more than its relative percentage of fault.

Respondents also cites to a medical malpractice case from Arizona titled Neil v. Kavena. Curiously, although Arizona adopted the language of the Uniform Contribution Among Tortfeasors Act ("UCAATA"), which is similar to the language adopted by South Carolina, three years later in 1987 "the legislature abolished joint and several liability in all situations except when both parties were acting in concert and in actions relating to hazardous wastes or substances or solid-waste disposal sites." Id. at 205 (citations omitted). The revised statute provides that each defendant is only liable "in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount," and that "all persons who contributed to the alleged injury… [is included in the percentage allocation] regardless of whether the person was, or could have been, named as a party to the suit." Id. at 205, footnote 2. In its

reference that "[s]ettlement dollars are not synonymous with damages" (Neil at 206, citing Duncan, 665 S.W.2d at 431) the Arizona court is merely expressing that in lieu of applying a setoff to the judgment against the non-settling defendant, the court will cap a defendant's damages at their determined percentage of fault. If South Carolina followed this theory, then the Respondent should have asked the jury to allocate the applicable percentage of fault to all of the potential tortfeasors in the case. That is, the jury would be asked to determine the relative percentages of fault across all the defendants that were or could have been listed in the case caption. In this situation, TCR would not be entitled to a setoff, but its potential liability would be capped by the jury's percentage allocation of fault across all parties that worked on the Palmetto Pointe project.

In Bishop v. Pecanic, 975 P.2d 114 (Ariz.1998), the Arizona Court of Appeals was asked to determine the impact of Arizona's version of UCATA between multiple defendants alleged to have committed intentional torts. The court found that the judgment should be set off by the prior settlements. The court noted that "UCATA was adopted to increase fairness for *both* plaintiffs and tortfeasors, and promote settlement of complex and multi-party litigation." Id. at 528 (emphasis in original). The court points out the disincentive for a plaintiff to settle: "[T]here is a very real possibility that a plaintiff seeking a joint and several recovery against a number of co-tortfeasors would never settle with all of them, opting to settle with some of the tortfeasors and proceed to trial against those with the greatest assets who could ultimately pay the entire jury award without benefit of a credit." Id. at 528. The Bishop court distinguished between cases where the jury awards a percentage allocation of fault and where the plaintiff seeks a joint and several judgment:

> We must keep in mind that Neil was not a joint and several liability case, and each party was liable only for its proportionate share of the plaintiff's damages. Any settlement the plaintiff reached with a particular tortfeasor did not affect her recovery against the other tortfeasors. However, this is a joint and several liability case and, in keeping with the Single Recovery Rule, the plaintiff's recovery against one tortfeasor does reduce the judgment against the other tortfeasors.

> Because the appellants were liable in tort for the same injury as were those who settled, they were entitled to the benefits of [Arizona's UCATA statutes]. The trial court erred in ruling to the contrary.

Bishop at 530 (internal citations and quotations omitted).

Therefore, applying the foreign case law that Respondent asks the Court to consider is simple. First, the total verdict amount is reduced by the settlements paid and then the non-settling defendant's percentage of fault is applied. The total general verdict rendered by the jury in the present case was $6,500,000. Complete paid total settlements of $2,137,500, which reduces the verdict to $4,362,500. The verdict should be further reduced by the other settlements by the parties at trial,[6] from Miracle ($325,000), Vasquez ($325,000), and Stanly's Vinyl Fence ($295,000), which reduces the verdict to $3,417,500. Respondent acknowledges set off for the settlements paid by Cornerstone ($150,000), Creekside ($150,000) and CertainTeed ($35,000), which reduces the verdict to $3,082,500. The disputed setoff amounts that TCR advocates should be allocated in full include the settlements for Atlantic Construction ($700,000), H&A Framing Construction ($500,000), Novus Architects ($650,000), and Cohen's Drywall ($125,000). Respondent only acknowledges $252,500 of these last four settlements are subject to setoff; however, if the entire amounts are applied then the judgment is reduced to $1,107,500. Then the punitive damages award of $500,000 against TCR is added, resulting in a revised judgment amount against TCR of $1,607,500.[7] Finally, per the analysis of the foreign jurisdictions, we apply TCR's relative

[6] TCR understands that JMC Construction reached a settlement with Respondent while Respondent's appeal of the directed verdict dismissing JMC at the close of Respondent's case in chief was pending. The JMC settlement should be included in the setoff calculations as well on remand of this appeal to the trial court.

[7] TCR acknowledged in its initial brief that the settlement paid by Gale Contractor services should not be used as a setoff. The Gale settlement amount of $22,500 is the difference between the calculations discussed above and the "TOTAL estimated, revised verdict amount" that TCR supplied to the trial judge in its spreadsheet at the post-trial motions hearing on June 7, 2020. [R.1914-1917 June 10, 2019 e-mail]

percentage of fault. Since TCR was considered jointly and severally liable with the general verdict rendered at trial, the multiplier is 100%, resulting in a final judgment against TCR of $1,607,500.

7. The resolution of this appeal in favor of TCR's arguments does not require prospective application.

Respondent argues in footnote 22 in its brief that the subject of this appeal is so novel that, in fairness, it should be applied prospectively pursuant to Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 442 S.C. 211, 810 S.E.2d 856 (2018). This assertion is incorrect. South Carolina has applied setoff under the common law for over 100 years. See Riley, 414 S.C. at 195, 777 S.E.2d at 830. The right to setoff was first codified in 1988 as part of the South Carolina Contribution Among Tortfeasors Act. See Id. The Oaks case, supra., is another in a long line of cases discussing setoff in South Carolina. In fact, TCR discussed in its initial brief [Initial Brief pp.40-41] and argued at the post-trial motions hearing [R.1820-1821 Post-Trial Hearing Trans pp.35-36] that the issue release settlements in the present case actually comport with The Oaks. The court in Wells Fargo held for the first time that an email from the court, an attorney of record, or a party was "service" for the start of calculating the deadline to file a notice of appeal. Wells Fargo at 217, 810 S.E.2d at 859. The resolution of the present appeal in favor of TCR does not rise to the same level of prospective application as the new service rule announced in Wells Fargo that impacts the timing of a deadline to confirm jurisdiction in the appellate courts.

CONCLUSION

For the foregoing reasons, TCR restates that the trial judge abused her discretion by not awarding a complete setoff of the joint and several, general verdict assessed against it. After all applicable settlements known at the preset are applied as setoffs, the judgment assessed against TCR should be reformed to $1,607,500. TCR requests this court remand the case to the trial court

so that the trial court can apply the proper setoff, which may include the post-trial settlement between Respondent and JMC Construction.

Respectfully submitted

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