THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
Dec 23 2020
SC Court of Appeals

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**

---

Justin O'Toole Lucey, Esquire, (SC Bar No.: 15438)
Anna McCann, Esquire, (SC Bar No.: 102314)
*JUSTIN O'TOOLE LUCEY, P.A.*
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
jlucey@lucey-law.com
amccann@lucey-law.com
*Attorneys for Respondents*

Edward D. Buckley, Jr., Esq. (SC Bar No.: 994)
*YOUNG CLEMENT RIVERS, LLP*
P.O. Box 993
Charleston, SC 29402
(843) 724-5446
ebuckley@ycrlaw.com
*Attorneys for Respondents*

December 23, 2020, Mount Pleasant, South Carolina

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .......... iv

COUNTER-STATEMENT OF ISSUES ON APPEAL .......... 1

SUMMARY OF ARGUMENT .......... 1

COUNTER-STATEMENT OF THE CASE .......... 2

A.) Introduction and Pre-Trial Matters .......... 2

B.) The Trial .......... 3

C.) TCR's Post-Trial Motions .......... 4

D.) TCR's Motion to Reconsider .......... 5

E.) TCR's Subsequent Appeal .......... 6

STATEMENT OF PERTINENT FACTS .......... 6

A.) Introduction .......... 6

B.) Settlements .......... 8

i. Allocation of Insulation and Drywall Settlements .......... 9

ii. Allocation of Framer Settlements .......... 10

iii. Allocation of Novus Settlement .......... 11

iv. Allocation of CBC - Pre- and Post-Trial Settlement .......... 13

C.) Damages Presented at Trial .......... 14

STANDARD OF REVIEW .......... 16

LEGAL ARGUMENT .......... 18

A. TCR Has Not Preserved its Ability to Argue Equitable or Common Law Setoff on Appeal .......... 19

B. TCR is Not Entitled to Automatic, Dollar-for-Dollar Setoff Under the Act Because Settlement Amounts in Excess of the $1,670,000 Setoff Already Granted Were Paid to the Association for Different Claim(s) for Different Injur(ies) From Those Tried Against TCR and Awarded by the Jury .......... 20

C. The Trial Court's Allocation and Resulting Setoff Were Lawful, Fair, and Just and TCR Has Failed to Meet its Burden Showing Otherwise; Nor Has it Proffered an Alternative Allocation .......... 24

i. The Trial Court's Allocation Was Fair, Reasonable, and Supported by South Carolina Law .......... 24

ii. TCR Fails to Show Allocation and Resulting Setoff Was Unfair, and Also Fails to Proffer an Alternative Allocation Methodology .......... 26

iii. TCR's "Empty Chair" Defense Does Not Resuscitate its Setoff Argument .......... 28

D. Allocation of the CBC Settlements Was Fair, Reasonable, and Supported by the Record, and TCR Seeks to Reallocate the CBC Settlements Solely to Benefit Itself .................. 29

i. The Association's Allocation Was Timely ........................................................... 30

ii. The Association's Allocation of CBC's Pre-Trial and Post-Trial Settlements Was Proper .......................................................................................................... 30

iii. South Carolina Law Does Not Allow A Settlement Allocation to Be Disturbed Simply Because It Benefits the Settling Parties .................................................... 32

iv. TCR is Not Entitled to a Setoff for the Punitive Damages Award Levied Against CBC ............................................................................................................ 33

E. TCR's "Verdict Form" Arguments Are Without Merit and Do Not Save its Failure of Proof ............................................................................................................ 34

F. TCR Has Already Received Three Reductions and is Not Entitled to Further Setoff .... 35

i. TCR is Not Entitled to Further Setoff Based on this Court's Recent Decision in The *Oaks* ............................................................................................................ 35

G. TCR Tried Allocation to the Jury and the Jury Complied ............................................. 39

H. Additional Setoff is Not Necessary to Provide Justice Between the Parties.................. 43

CONCLUSION ............................................................................................................ 44

# TABLE OF AUTHORITIES

**Cases**


*Bennett v. Inv'rs Title Ins*. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006).......... 21

*Chester v. S.C Dep't of Pub. Safety*, 388 S.C. 343, 346. 698 S.E.2d 559, 560 (2010). ................ 29

*Daversa v. P.T.C. Properties*, 599 N.Y.S.2d 432, 434 (Civ. Ct. N.Y. 1993) (quoting *Matter of New York City Asbestos Litig*., 188 AD2d 214, 218 [1st Dept 1993]) .................................... 31

*Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 386, 166 S.E.2d 308, 312 (1969) ........ 17

*Duncan v. Cessna Aircraft Co*., 665 S.W.2d 414, 431 (Tex.1984) ............................................. 31

*Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)……………………….20

*Ellis v. Arkansas Louisiana Gas Co*., 609 F.2d 436, 439-40 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980)……………………………………………………………………….40-41

*Glover v. Stack*, No. 2016-001807, 2019 WL 2024579, at *2 (S.C. Ct. App. May 8, 2019)……20

*Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990)……………...31

*Hawkins v. Pathology Assocs. of Greenville, P.A*., 330 S.C. 92, 113-15, 498 S.E.2d 395, 407 (Ct. App. 1998); .......................................................................................................... 16, 26

*In re Wells,* 43 S.C. 477, 21 S.E. 334, 337 (1895)......................................................... 17, 27, 29

*McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997)………………………… 40-41

*McGee v. Bruce Hosp. Sys.,* 344 S.C. 466, 471-72, 545 S.E.2d 286, 288-89 (2001) .................. 33

*Morris v. Bland,* No. 5:12-CV-1377-RMG, 2015 WL 12637911 at *13 (D.S.C. Dec. 31, 2014)........................................................................................................ 17

*Murphy v. United States*, 836 F. Supp. 350, 351 (E.D. Va. 1993)............................................... 44

*Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203, 206 (App.1993) ..................................................... 31

*Riley v. Ford Motor Co.,* 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015)............26-27, 32-33, 36

*Rookard v. Atlanta & Charlotte Air Line Ry.,* 89 S.C. 371, 376, 71 S.E. 992, 995 (1911) .......... 18

*Rutland v. S.C. Dep't of Transp.,* 390 S.C. 78, 82-83, 87, 700 S.E.2d 451, 453-54, 456 (Ct. App. 2010)….. ......................................................................................... 17, 26, 29, 43

*Smith v. Widener*, 397 S.C. 468, 471-73, 724 S.E.2d 188, 190-91 (Ct. App. 2012) ............................................................................................................16-18, 21, 24, 26

*State v. Somerset,* 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981) ........................................... 40

*The Oaks at Rivers Edge Property Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 433-42, 803 S.E.2d 475, 480, 482-83 (Ct. App. 2017) .......................................................................................................... 18, 21-22, 26, 29, 35-39

*Ward v. Epting*, 290 S.C. 547, 559-60, 351 S.E.2d 867, 874-75 (Ct. App. 1986)........................ 27

*Welch v. Epstein,* 342 S.C. 279, 312–13, 536 S.E.2d 408, 426 (Ct. App. 2000).................... 18, 29

*Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc*., 659 So. 2d 249, 252 (Fla. 1995) .................... 31

*Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018)…………………………………………………………………………………..36

*Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 348 (1971)................................ 40

**Statutes**

S.C. Code Ann. § 15–38–10 (2005)………………………………...……………………1, 21

S.C. Code Ann. § 15–38–15 (2005)…………………………………………………………4, 28, 29

S.C. Code Ann. § 15–38–50 (2005)……………………………………………………...16, 20, 24

S.C. Code Ann. § 15–38–520 (2012)………………..…………………………………………...33

**Rules**

Rule 15(b), SCRCP.......................................................................................................................... 40

Rule 59(e), SCRCP……………………………………………………………………...20

## COUNTER-STATEMENT OF ISSUES ON APPEAL

1) **Is the outcome of this appeal dictated by the overlapping injury methodology set forth in *Smith v. Widener*, the burden of proof standard set forth in *In re Wells* and *Diamond Swimming Pool Co. vs. Broome*, and the guidance of *Oaks at Rivers Edge vs. Daniel Island* ?**

2) **Has TCR met its burden to establish that the Trial Court abused its discretion in conducting its setoff analysis pursuant to, *inter alia*, *Smith*, *Oaks*, *In re Wells,* and *Rivers Edge*?**

3) **Has TCR met its burden to establish that the Trial Court's reasoned allocation and setoff was unfair, unreasonable, or unjust?**

4) **Has TCR met its burden (1) to proffer an equitable allocation; or (2) justify that allocation as fair, bona fide, and just?**

5) **Has TCR shown that Plaintiffs are reaping a double recovery?**

6) **Did TCR preserve its ability to argue for an equitable, or common law setoff on appeal?**

7) **Did TCR offer a single justification, then or now, for its claimed setoff entitlement for the $500,000 in punitive damages paid by CBC? Or for the monies paid by the Architect for its liability on design and construction issues that never made it to trial?**

## SUMMARY OF ARGUMENT

TCR is not entitled to the automatic, non-discretionary setoff it seeks pursuant to the South Carolina Contribution Among Tortfeasors Act, § 15-38-10, *et. seq*., because many "injuries" in a multi-party, complex construction defect case are distinct; therefore, settlements for injuries different from those tried against a non-settling defendant are not automatically setoff against a verdict. The Trial Court, therefore, properly exercised its discretion in making a factual determination of how to allocate the settlements between the overlapping and non-overlapping claims.

Furthermore, TCR has already received three damage reductions. First, the Association twice 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. TCR now 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 that 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. (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

[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).

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**

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

[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. 840:5-859:14; Verdict Form).

argued it was entitled to a $5,415,000 setoff, for a total verdict of $1,585,000. (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 CBC's payment of the $500,000 punitive damages award the jury levied against CBC. (TCR Initial Brief).

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. (*Id.* 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).[3]

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

---

[3] 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.

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.

(*Id.* at 3). Conversely, the Trial Court held that TCR sought to setoff damages which were not compensation for the same injuries encompassed in the jury's verdict, and that TCR "failed to meet its burden of persuasion to demonstrate to the court that the allocations […] are unfair or unjust." (*Id.* at 4). The Trial Court was further persuaded by Plaintiffs showing that no double recovery was had, especially given that they had reduced their damages estimate and removed a number of defects from the jury's consideration. *Id.*

**E.) 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). TCR has 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 portions 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 the Court's knowledge of the case, including extensive pre-trial 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 should be sustained, as 1) each allocation is supported by the record; and 2) because TCR did not proffer (and has not preserved its ability to proffer now) an alternative allocation or factual support for any allocation other than that submitted by the Plaintiffs and adopted by the Trial Court.

**B.) Settlements**

Prior to the start of trial, Plaintiffs received $4,725,000 in settlements. (August 15, 2019, Pltfs' Memo in Opp'n to MTR, Ex. A). There is a category of these pre-trial settlements that TCR refers to as "agreed issue released settlements."[4] (TCR Initial Brief at 22, 43-44). TCR concedes it is not entitled to receive a setoff for the "issue release settlements," because those items were "removed from the trial of this case." (*Id*. at 43). 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 totals $587,500. (August 15, 2019, Pltfs' Memo in Opp'n to MTR at Ex. A). For five (5) of these settlements, Plaintiffs concede only a partial setoff in order to account for any potential overlap in the injury and resulting damage caused by the settling party with the issues tried before the jury. (*Id.* at 9-10).[5]

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"). (August 15, 2019, Pltfs' Memo in Opp'n to MTR 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,

[4] Discussed in further detail *infra*, TCR's repeated references to "agreed" and/or "designated" issue releases is a misnomer as to TCR, and it is a red herring as it relates to setoff. 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).

[5] In total, therefore, Plaintiffs received $4,725,000 in pre-trial settlements and gave $1,407,500 in issue releases and $587,500 in partial setoff for a net of $2,730,000.

[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 22, fn.4).

CBC, was contractually allocated by written agreement of the parties; this same allocation 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, specifically "claims […] for suppling [sic] and installing insulation and drywall […]." (July 12, 2018, Cohen's Settlement). A narrow category of drywall issues related to firestopping repairs was litigated at trial (*see, e.g.* Tr. Trans. 394:4-25); however, injuries related to defective insulation installation were not litigated, and Plaintiffs sought no damages at trial related to insulation deficiencies[7]. (*See* P. Ex. 677). Plaintiffs allocated Cohen's $125,000 settlement equally between injuries related to 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 (*i.e.*, the potential that the injury and resulting damages from drywall defects contemplated in the Cohen's settlement overlapped with an injury tried to verdict against TCR, even though, by all appearances, the jury did not award damages on the fire suppression drywall).[8] (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 for either the first $62,500 paid by Cohen or beyond the $62,500 allocated to drywall, nor has TCR

---

[7] The repair estimate did include duct insulation in the MEP repair (mechanical, electrical, plumbing). This has nothing to do with Cohen, as it was not an MEP subcontractor. For a list of all MEP subcontractors, see the Consent Order of Dismissal, filed June 6, 2019.

[8] There was actually no evidence adduced that the fire suppression drywall work was performed by Cohen's.

attempted to show that injuries related to defective insulation were presented to the jury and/or encompassed in the jury's verdict against TCR.

### 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) principal issues: (1) shear walls;[9] 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).

The previously litigated and settled shear wall substrate fastening issue (which was not reflected in any estimate admitted at trial) was referenced by Plaintiffs during opening in explaining to the jury the role of the siding repair subcontractor Defendant, JMC; and by JMC in its opening in explaining its own role to the jury. (Tr. Trans. 189:4-10; Tr. Trans. 219:10-14). In fact, JMC's counsel further confirmed that it had been paid by the framer, Atlantic Construction, for the siding work. (Tr. Trans. 219:17-18). Notwithstanding, TCR has made absolutely no effort to explain why the shear wall defects are the same injury, or what an equitable allocation would be in light of minor references to other framing issues, *e.g.*, hurricane strapping, during the trial.

Plaintiffs' allocation accounted for any potential overlap between settled injuries and framing-related damages sought at trial; and the Trial Court reduced the final judgment against TCR by $125,000[10] to account for it. TCR has not proffered any evidence showing that it is entitled

[9] 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).

[10] 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

to a dollar-for-dollar setoff for the monies paid by the Framing Subcontractors, nor has TCR attempted to show that injuries related to the defective installation of shear walls were presented to the jury, or that the injury related to defective installation of windows was accounted for in the jury's verdict, beyond the amount allocated by the Trial Court. [11]

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 17). 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.*, Ex. C at 3).[12] Plaintiffs' settlement with Novus was for its 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.

---

issues at trial. The total framing settlements were actually $1,200,000; therefore, the overlap setoff was in excess of 10%.

[11] The shear wall field reports by Britt Peters were listed as Exhibits 459-463 in the list appended to Plaintiffs' Pre-trial Brief but were not entered into evidence. (Pl. Pre-trial 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 dire presented to the Court and jury. (Joint Voir Dire). TCR has the shear wall evidence and testimony and chose not to address it.

[12] 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).

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 Initial Brief at 20-21; 40-42). 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 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.*

Notably, when Novus was added as a defendant in the Amended Summons and Complaint on November 4, 2016, Respondents justified the addition with three expert affidavits as to professional negligence by Douglass Smits, Robert Castles, and David VanDommelen. (See *Id.*). The three experts opined as to three different types of professional negligence by Novus: negligent fire suppression design (Smits), negligent civil site drainage design (Castles), and negligent exterior envelope component design (VanDommelen). (See *Id.*). Two of the three system defects described in these affidavits, *i.e.*, two-thirds of Plaintiffs' claims against the architects, did not result in any portion of the verdict against TCR. (Site drainage was a settled issue, and there was a defense verdict on the fire suppression construction that TCR was not involved in.) How can

TCR possibly prove that the claim against it was the same as the claim against the architects? No wonder it did not even try – it can't.

Notwithstanding the lack of evidence as to the standard of care, breach, or proximate cause, Plaintiffs allocated $65,000, or 10% of Novus' settlement, to account for any potential overlap between injuries and resulting damage caused by Novus and injuries and resulting damage tried to a verdict against TCR. (August 15, 2019, Pltfs' Memo in Opp'n to MTR). The Trial Court agreed and further reduced the judgment against TCR by $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 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).[13]

The jury heard from the Association's repair cost expert, licensed general contractor Jay Handegan, 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 **<u>$15,258,000</u>** damage estimate (P. Ex. 677). At trial, Plaintiffs took this 2017 repair estimate, removed numerous items that no longer applied to the case being tried, and added repair costs for several additional defects which had arisen (primarily including fire suppression repair costs). (Tr. Trans. 591:8-592:17). This revised estimate (P. Ex. 1049) was marked for identification purposes only, but the foregoing details were put into evidence through the oral testimony of Plaintiffs' repair expert, Jay Handegan. (Tr. Trans. 591:8-592:17). The revised total repair cost testified to by Handegan was $13,428,000. (*Id.* at 592:9-11).

---

[13] 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).

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[14] 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). As to a loss of use, 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).

In sum, Mr. Handegan removed $3,827,000 from his 2017 estimate (*see infra* fn. 30 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 dollar amount of settlements received prior to trial,

---

[14] 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).

$4,725,000, before one even considers that $1,407,500 of the pre-trial settlements resulted in issues releases, and $587,500 of the pre-trial settlements were offered and granted as setoff.

The verdict the jury ultimately returned is millions of dollars less than what the Association requested. *Compare* (Verdict Form of $6,500,000) *with* (W-2 Tr. Trans. 726:11-25) ($12,800,000 verdict requested). TCR cannot and has not proved that the judgment entered overlaps with any injuries or damages purportedly included within settlements paid to Plaintiffs, beyond the $1,670,000 setoff granted by the Trial Court.

## 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 (emphasis added); *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).

Conversely, when a prior settlement involves compensation for a **different injury** from the injury tried to a verdict, there is no setoff as a matter of law. *See Smith*, 397 S.C. at 473, 724 S.E.2d at 191; *see also 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) (emphasis added). If setoff is not "automatic," the issue becomes an equitable one for the trial court's consideration and discretion.

When a settlement involves two or more claims, one of which involves the same injury as the claim tried to verdict and one or more of which does not, 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)(emphasis added); *see also Morris v. Bland, No*. 5:12-CV-3177-RMG, 2014 WL 12637911, at *13 (D.S.C. Dec. 31, 2014) ("In particular, compensatory damages on survival claims and wrongful death damages are compensation for different injuries, and courts must determine what portion of a settlement are attributable to each injury.").

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").

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.

*Id.*, *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).

Here, the contested settlements TCR seeks to setoff did not involve the same claims for the same injuries as those tried to a verdict against TCR, and thus setoff does not arise automatically as a matter of law. The Trial Court, therefore, engaged in the factual determination mandated by our jurisprudence (*see e.g.*, *Smith*) when it assessed Plaintiff's proffered allocations and approved them. The Trial Court's engaging in this factual determination was not controlled by an error of law, nor were its reasoned allocations unsupported by the record. TCR is not entitled to further setoff as 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* injuries as those tried to a verdict 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 setoff the verdict with the punitive damages paid by CBC – even though the jury awarded

separate punitive damage awards against CBC and TCR.[15] 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. [16]

### A. TCR Has Not Preserved its Ability to Argue Equitable or Common Law Setoff on Appeal

TCR has consistently argued that it is entitled to 100%, non-discretionary setoff under the Act for all settlements other than those it calls "issue release" settlements. *See, e.g.* (TCR Post-Trial Mot. at 11) ("Applying set off is mandatory."); *see also* (Hrg. Trans. 29:6-7) ("[S]etoff is a –required by the law. It is not discretionary."); (TCR Mot to Reconsider Form 4 Order at 3) ("Applying set off is mandatory."); (TCR Initial Brief at 27) ("TCR is entitled to complete setoff of the jury verdict by the settlements reached in this case that were not otherwise removed from review by the jury and designated as issue releases.").

Because TCR failed to argue for an equitable or "common law" setoff in either its post-trial motions or at the post-trial motion hearing, the Trial Court's Order denying TCR's Motion to Reconsider did not address TCR's common law setoff position. Rather, the Trial Court found that TCR "failed to establish that the settlements plaintiffs received in excess of $1,670,000.00 are damages awarded against a settling joint tortfeasors [sic] who has compensated the Plaintiff for

[15] While TCR appears to add its own punitive damage verdict back into its final judgment in its previously filed Reply Brief, by sleight of hand, TCR discretely and brashly tries to setoff CBC's payment of CBC's punitive damage verdict against TCR's actual damages.

[16] For additional TCR illogical arguments, *see*, *e.g.*, pages 32-33 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 on this issue. (*See* Verdict Form).

the same claim and for the same injury." (Order Denying TCR's MTR, at 4) *citing* (S.C. Code Ann. §15-38-50).

TCR did not move to reconsider or clarify the Court's final order, and thus the issue is not preserved for appellate review.[17] *Glover v. Stack*, No. 2016-001807, 2019 WL 2024579, at *2 (S.C. Ct. App. May 8, 2019) ("Although [Appellant] raised [equitable setoff] during the motion hearing, the circuit court's final orders addressed only Simpson's entitlement to a setoff under the statute. Because Simpson did not subsequently file a Rule 59(e), SCRCP, motion seeking a ruling on her common law equity argument, it is not preserved for appellate review.") *citing Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding a party must file a Rule 59(e), SCRCP, motion to reconsider when an argument has been raised, but not ruled on, to preserve it for appellate review).

Even if this Court were to disagree and find that TCR *has* preserved the issue of equitable setoff, TCR betrays itself with the final sentence of its Second Amended Initial Brief: "TCR's requested setoff allocation is the mandated statutory and common law result […]." (TCR Initial Brief at 46). There is no "mandatory" common law setoff.

**B. TCR is Not Entitled to Automatic, Dollar-for-Dollar Setoff Under the Act Because Settlement Amounts in Excess of the $1,670,000 Setoff Already Granted Were Paid to the Association for Different Claim(s) for Different Injur(ies) From Those Tried Against TCR and Awarded 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

[17] It is unclear to Respondents whether TCR is now arguing for common law setoff in the alternative, as TCR makes tangential references to preventing "double recovery" and related "equitable" principles; however, TCR has made no attempt (either here or in the Trial Court) to show that Plaintiffs' have received a double recovery.

> 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's argument in both its briefings to the Trial Court and now on appeal that setoff for each penny of the Contested Settlements is **"not discretionary"** means that TCR believes it is entitled to setoff pursuant to the South Carolina Contribution Among Tortfeasors Act (the "Act"). S.C. Code § 15–38–10, *et seq.* For this statutory, non-discretionary setoff to attach, however, the Contested Settlements must have been paid to Plaintiffs **<u>on the same claim for the same injury</u>** as that tried to a verdict against TCR. (*See Smith v. Widener*, 397 S.C. at 471-2, *supra*) (emphasis added). The "trigger" for the Act to apply, therefore, is relatively simple, and it turns on the question of whether the settlement(s) were for the "same injuries" as those alleged and tried to a verdict against TCR.

TCR argues that the Act applies because "damages in construction defect cases like [this one] all arise out of the same set of facts or type of injury." (TCR Initial Brief at 38). And, therefore, 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 35, 37-38, 42; *see also* Hrg. Trans. 35; 44-45). TCR cites to no South Carolina authority to support this argument; accordingly, it 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 South Carolina, however, the question of whether injuries and resulting damages are indivisible for the purpose of setoff in the context of a construction defect suit has already been answered by this Court. Although TCR acknowledges the existence of the highly relevant,

factually similar *Oaks* decision, it ignores one of that case's main holdings: cost of repair damages for distinct and uniquely damaged building components are not the "same injury" for setoff purposes. TCR's brief discusses setoff precedent in South Carolina as if the *Oaks* does not exist; specifically, TCR ignores that this Court in the *Oaks* found that damages awarded for, *e.g*., window repair, address a **distinct injury** from damages awarded for, *e.g*., brick replacement. 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.[18] The *Oaks* holding makes sense, and to hold otherwise would chill settlements and clog the courts. To hold otherwise would be to establish a

[18] The *Oaks* also holds that certain damages attendant to construction defect actions, *i.e.*, loss of market value, are distinct injuries from damages related to the repair of defective items. 420 S.C. 424, 443, 803 S.E.2d 475, 485 (Ct. App. 2017). ("[T]he trial court did not err in awarding Respondents damages for both loss of access to the market and the cost of repairs. […] [Plaintiffs] suffered two separate injuries with two different sets of damages."). This is important here because no pre-trial settlements paid the Association for loss of use – a "different" injury the Association asked the jury to include in its verdict. Appellant asserts the prior settlements included loss of use recovery because of the "loss of use" standard language in the releases. The releases, *e.g*., Atlantic, also include "loss of companionship," but it is unlikely that Appellant can argue that Plaintiffs were compensated for that. (Atlantic Settlement Agt. apre-t Para. 5) The fact that the releases were comprehensive (using boiler plate language) provides no evidence that Respondent was paid for loss of use. Importantly, the scope of the release was based upon "work performed" and "materials… supplied" by Releasee (Atlantic). *Id.* TCR has not demonstrated that the verdict against TCR is for the work performed or materials supplied by, *e.g.*, Atlantic – and its effort so seek credit for Atlantic's payment must fail.

rule that the plaintiff must always prove a full set of damages in a multi-party complex case, no matter how circumscribed the remaining unsettled issue/damage. Stated differently, if the plaintiff still has to prove his, *e.g.*, stucco defects, the incentive to settle with the stucco subcontractor is reduced.

TCR implicitly concedes, in multiple ways, that construction defect damages are, in fact, separable, and therefore all injuries relating thereto are not the "same." For example, TCR's drumbeat regarding "issue release" settlements actually *supports* Plaintiffs' arguments here. TCR is not entitled to setoff for "issue release[d] items" not because of any formal or informal agreement; rather, TCR is not entitled to that setoff because **those injuries were not tried to the jury, nor did Plaintiffs seek damages related to those injuries against TCR**. TCR's tacit "agreement" to consider those items as "issue released items" is a fiction, and TCR's attempt to setoff, *e.g.*, 100% of the framing settlements against the jury's verdict does not survive the "straight face test" when TCR's own logic regarding issue-released items is applied. (*See* TCR Initial Brief at 35) ("TCR is entitled to setoff of all the settlements that were not otherwise removed from the trial of this case […]"); (*See also Id.* at 43) ("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.").

As a second example, TCR argues that it would be "fundamentally unfair […] for TCR to be responsible for repairing the firewall and fireproofing deficiencies arguably attributable to W.C. Services […] as it would be unfair for W.C. Services to be responsible for the alleged siding deficiencies." (TCR Initial Brief at 35). How then is it fair for TCR to receive a credit for 100% of prior settlements with defendants with distinct scopes of work to address distinct injuries resulting in distinct damages? TCR cannot have it both ways.

TCR is not entitled to mandatory setoff contemplated by S.C. Code Ann. § 15-38-50 because the Contested Settlements were not paid to compensate Plaintiffs "for the same injur[ies]" as those tried to a verdict. S.C. Code Ann. § 15-38-50 (2005); *see also Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) ("[W]hen the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law."). 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 facts in and trial of this case? The answer is no, TCR has not, nor did it make any such attempt.

### C. The Trial Court's Allocation and Resulting Setoff Were Lawful, Fair, and Just and TCR Has Failed to Meet its Burden Showing Otherwise; 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, and 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). Furthermore, TCR's reliance on its failed "empty chair" arguments made during trial is misplaced: "empty chair" arguments made by a non-settling defendant do not create a mandatory setoff.

#### i. The Trial Court's Allocation Was Fair, Reasonable, and Supported by South Carolina Law

Given that the Contested Settlements involved injuries which differed from those tried to a verdict, the Trial Court made the factual determination of to allocate the Contested Settlements to account for any potential overlap. (*See* "Statement of Pertinent Facts", *supra*, at §B). The Trial

Court examined each of the Contested Settlements and found that "only $1,670,000.00 in settlement[s]" represent "damages awarded against a settling joint tortfeasor who has compensated Plaintiff for the same claim and for the same injury." (September 25, 2019, Order Denying TCR MTR at 4). The Trial Court gave an example of one such "factual determination":

> 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) (emphasis added). 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:

- 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 during trial and not in estimate. (P. Ex. 677).[19]

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 attempts to distract from its own lack of evidence by calling the Association's allocation "arbitrary". (TCR Initial Brief at 42).

[19] As can be seen from the absence of shear wall damages in both P. Exs. 677 and 1049, the shear wall issue surfaced after the compilation of the original estimates and settled before the adjustment in the revised estimate and is not reflected in either.

### ii. TCR Fails to Show Allocation and Resulting Setoff Was Unfair, and Also Fails to Proffer an Alternative Allocation Methodology

TCR does not explain in its brief *how* any of the settlements totaling the $3,722,500 *additional* setoff it seeks compensated the Association on the same claim for the same injury as that tried to the jury, because it does not believe that it needs to do so. 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 38).[20] It then uses this fallacious 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 44). 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.[21] Since TCR already submitted its brief, it abandoned any chance it had to resuscitate its argument.

[20] Not only does TCR not proffer *any* South Carolina precedent to support this argument as it relates to construction defect injuries, it cites to *Ellis versus Oliver* for the proposition that "[t]he injury contemplated in the setoff statute is broad enough to include all damages." (TCR Initial Brief at 37) *citing Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 (Ct. App. 1999). However, the court in *Ellis* erroneously held that "wrongful death and survival are the same claim for the same injury." *Id.* This was in error, as clarified by this Court in *Smith*:

> The conflict between *Rutland* and *Ellis* is resolved by reference to *Bennett v. Spartanburg Railway, Gas & Electric Co*., 97 S.C. 27, 81 S.E. 189 (1914), in which the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29–30, 81 S.E. at 189–90.

*Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Although not explicitly overruled, this Court in *Smith* made clear that wrongful death and survival claims are *not* the same claims for the same injuries. *Id.* Therefore, TCR's reliance on *Ellis* for any related premise is nebulous.

[21] *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.*,

Separately, TCR has abandoned its ability to factually contest the Association's allocation of Contested 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 post-trial and do not show how TCR's proffered allocation (100% setoff of the Contested Settlements) is more fair than Plaintiffs' allocation. In fact, TCR does not state, assert, or otherwise show that the Trial Court's allocation is *unreasonable*.[22] An attempt at re-allocation must be supported by the party who seeks it (*see Riley* and *In re Wells, supra*), and TCR failed to offer any justification either at the Trial Court or now, on appeal. 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? TCR has not shown, or even argued, that it was held liable for injuries and related damages caused by the Framing Subcontractors *in excess of* the $125,000 setoff granted by the Trial Court.

Not only has TCR abandoned this issue, <u>it is impossible for TCR to prove</u> 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).[23] At this juncture, TCR not only has a failure of proof, it has a complete lack of proof.

---

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).

[22] *Riley v. Ford Motor Co*., 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) ("Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that $20,000 for the survival action is unreasonable.").

[23] "[T]he 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).

### iii. TCR's "Empty Chair" Defense Does Not Resuscitate its Setoff Argument

TCR spends a great number of pages in its Initial Brief explaining to the Court that "[t]he jury heard testimony regarding all the different parties that worked together to construct the Project" in an attempt to validate complete setoff of the Contested Settlements. (*See, e.g.* TCR Initial Brief at 40-42). TCR erroneously equates its ability to argue an "empty chair defense" with an ability to argue that certain settled injuries were *actually* encompassed in the jury's verdict. The empty chair defense, as codified by the Act, gives a defendant the "the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15(D). TCR's arguing during trial that, *e.g.*, the architect is actually to blame for Plaintiffs' injuries does not mean that the jury's verdict therefore encompassed Plaintiffs' claims for injuries against the architect. Put differently, simply because TCR blames the architect for its own failings does not mean that Plaintiffs' claims and injuries alleged against the architect were *actually* on trial.

TCR's arguments regarding its use of the empty chair defense to the Trial Court in post-trial briefings also does not rectify its abject failure to proffer an alternative allocation. Although TCR pointed to tangential references in the trial transcript to, *e.g.*, "framing", (Tr. Trans. 445:4-14; 448:21-452:25), it never showed the Trial Judge why any prior settlements by the Framing Subcontractors should have been allocated any differently. By all accounts, TCR's gamble on the empty chair defense failed in part and succeeded in part: it failed in that it did not break the causal chain enough to result in a defense verdict, and it succeeded in that the jury awarded Plaintiffs far fewer damages than Plaintiffs sought. 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).[24]

Relatedly, because TCR was found liable for gross negligence by the jury, the entirety of Section 15-38-15 is not available to TCR. *See* S.C. Code Ann. § 15-38-15 (F) ("This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional […]."); *see also Oaks* 420 S.C. at 442, 803 S.E.2d at, 485 (holding that trial court properly declined to allocate damages against condominium developer and construction manager under contribution statute where developer and manager were found grossly negligent).

**D. Allocation of the CBC Settlements Was 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. Importantly, and because any attempt at re-allocation must be supported by the part who seeks it (*In re Wells, supra*), TCR's failure, at the Trial Court level to either 1) show Plaintiffs' allocation of the CBC settlement was unreasonable or unfair or 2) to show that such

[24] Similarly, TCR attempts to blame the "empty chair" architect for the claims and related injuries Plaintiffs presented at trial while simultaneously conceding issue releases. In so doing, TCR is implicitly conceding that the portion of the work that the architect performed related to the released issue is a different injury; and therefore, the architect's settlement must be allocated - and no request was made or evidence submitted by TCR to support an allocation of this Contested Settlement.

allocation actually resulted in Plaintiffs' receiving a double recovery, is fatal to its argument now on appeal.

### 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 29). 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 ).[25] 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. (Notice of Appeal). The first settlement agreement with CBC was reached on July 10, 2018, approximately one (1) year before entry of the final judgment on July 23, 2019. [26] 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 Was 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 29-30).

---

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

[26] 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 23).

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, exposure, and expense of trial and appeal. *See, e.g. Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990) ("The decision to settle was reasonable in the circumstances, because it "bought peace" and avoided a costly trial which might possibly result in a verdict adverse to the [Defendant]."); *see also Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 252 (Fla. 1995); *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).[27]

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, 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.*

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

### 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. Furthermore, the purpose behind the Legislature's codification of setoff was to strike a balance between "preventing a double recovery" and South Carolina's "strong public policy favoring the settlement of disputes." *Riley*, 414. S.C. at 196, 777 S.E.2d. at 830. Beyond

stating that Plaintiffs would receive a double recovery with the Trial Court's reasoned allocation of CBC's settlements, TCR has not demonstrated that a double recovery would occur. (*See* TCR Initial Brief at 46). Indeed, the Supreme Court in *Riley* reversed the Court of Appeals' reallocation in part because the Court of Appeal's decision did not explain "how [the allocated settlement] ran afoul of the public policy preventing a plaintiffs' double recovery. 414 S.C. at 191, fn. 3. No double recovery was had (see §F, *infra*), and TCR has not shown otherwise. 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.

### E. 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 addressing the unique characteristics of this case. (May 3, 2019, 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 that would satisfy TCR's concerns. (Tr. Trans. 116:8-11). This never happened. (W-2 Tr. Trans. 669, 680-699).

TCR did, in fact, subject a proposed verdict form. (*See* May 15, 2019 Email from R. Campbell to Court, attaching TCR's proposed Jury Verdict Form). Notably, TCR's proposed verdict form asks the jury for a single damage number against all defendants as to each cause of action. (*See id.* at ¶¶ 10, 18, 35). This runs in stark contrast to TCR's representation to this Court that "[g]enerally, the defendants all advocated for a version of the jury form that asked the jury to allocate liability among each of the defendants"; "TCR and the other defendants at trial submitted proposed jury verdict forms that would have allowed the jury to separate out which components of repair were properly associated with a defendants' scope of work"; and "Respondents insisted on a general verdict damages number." (TCR Initial Brief at 20, 32).

The Defendants failed to submit a single agreed upon verdict form as requested by the Court. (W-2 Tr. Trans. 664-666). No Defendant submitted a plausible verdict form. (Defendants'

Proposed Verdict Forms.) Like so many other portions of the trial, the Defendants intermingled, and leap-frogged their arguments and issues (in this instance, verdict form and jury charge arguments) in a manner that no reasonable person could follow. (W-2 Tr. Trans. 668-700).

Having caused or failed to take any steps to avoid trial court error, TCR cannot now, on appeal, argue that the verdict form used by the Trial Court in any way resulted in prejudice. Nor did Appellant ever object to the final proposed verdict form proffered by the Judge immediately prior to closing. (Plaintiffs' Revised Verdict Form and Cover Email; W-2 Tr. Trans 697). TCR's verdict form arguments otherwise throughout its initial brief is pure sleight of hand.

### F. TCR Has Already Received Three Reductions 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, empty chair blame and damage allocation setoff were 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

38). 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).[28]

In the *Oaks,* 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.*

[28] 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 then 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.

Here, the Peas Island Association reduced their repair estimates at trial and conceded setoffs by <u>more cumulatively</u> than the amount the Association received in pre-trial settlements. The Association's December 2017 Damage estimate was $15,258,000. (P. Ex. 677). There were $4,137,500 in pre-trial settlements that resolved various issues and/or reduced Plaintiffs damages.[29] Handegan removed **$3,827,000** in resolved items from his trial estimate,[30] initially

---

[29] There were $4,725,000 in pre-trial settlements total including the first CBC settlement; Plaintiffs conceded issue releases as to $1,407,500 of these funds and setoffs as to $587,500 of these funds, for a net of $2,730,000 in remaining pre-trial settlements at issue, which were more than offset with the $3,827,000 reduction in the revised estimates (before additional fire suppression damages).

[30] 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.

reducing the original damages to **$11,431,000**. He thereafter added back $789,394 in additional fire suppression damages and an additional contingency "due to recent findings" in the amount of $1,220,800 for total add backs of $2,011,000 which, with minor adjustments, results in a revised trial estimate of $13,428,826. (Tr. Trans. 592:4-17).[31]

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.

### G. TCR Tried Allocation to the Jury and the Jury Complied

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

[31] 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)

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).[32]

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 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,

[32] 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.

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). In closing, 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 <u>and</u> 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, $15,000,000 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.

### H. 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. To the contrary, any additional setoff against the damages awarded to the Association as a result of TCR's conduct would result in a windfall to TCR, which is the

opposite of an equitable result. 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.").

## 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: <u>*/s/Justin O'Toole Lucey*</u>

Justin O'Toole Lucey (Bar No. 15438)
Anna McCann (Bar No. 102314)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
amccann@lucey-law.com

*-and-*

Edward D. Buckley, Jr., Esq.
Young Clement Rivers, LLC
P.O. Box 993
Charleston, SC 29402
(843) 724-5446
ebuckley@ycrlaw.com

*Attorneys for Respondents*

December 23, 2020
Mt. Pleasant, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Dec 23 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 December 23, 2020, via email to Andrew N. Cole, Esq. at acole@collinsandlacy.com.

Respectfully submitted,

By: <u>*/s/Justin O'Toole Lucey*</u>

Justin O'Toole Lucey (Bar No. 15438)
Anna McCann (Bar No. 102314)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
amccann@lucey-law.com

*-and-*

Edward D. Buckley, Jr., Esq.
Young Clement Rivers, LLC
P.O. Box 993
Charleston, SC 29402
(843) 724-5446
ebuckley@ycrlaw.com

*Attorneys for Respondents*

December 23, 2020
Mt. Pleasant, South Carolina