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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594
Appellate Case No.: 2018-001230

One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated,

Respondents,

v.

Builders FirstSource-Southeast Group, LLC, Appellant.

RETURN TO PETITION FOR REHEARING

As instructed by this Court's letter dated April 12, 2021, Respondents ("Association") submit this Return to Appellant's ("BFS") Petition for Rehearing ("Petition") and request for an *en banc* hearing ("*En Banc* Request").

INTRODUCTION AND SUMMARY OF RETURN ARGUMENTS

BFS' Petition and *En Banc* Request should be denied. This Court correctly dismissed this appeal because BFS did not "timely serve its notice of appeal within 30 days after receiving the final order ending this action" ("Dismissal Order"). The Trial Court's Final Order was entered on September 1, 2016 and received by BFS on September 27, 2016. ("Final Order"). This is the date BFS' thirty-day appeal clock started to run, and it continued to run until it expired on October 28,

2016. Rule 203(b)(1), SCACR. BFS did not appeal the Final Order by this date; rather, it waited until June 29, 2018 to serve its appeal of the Final Order. As a result, this Court lacks appellate jurisdiction. *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E. 2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal."). Because this Court lacks jurisdiction to address BFS' appeal of the Final Order, there's nothing left for this Court to rehear. The only other order BFS appeals relates to procedurally and substantively flawed post-trial motions that this Court correctly found "did not stay the time for [BFS] to file its appeal" (Dismissal Order). These finding are supported by the record and the law; and nothing in BFS' Petition undermines their validity.

BFS' Petition repeats the same arguments and again asks this Court to review three matters that do not warrant review. First, BFS asks the Court the reconsider a finding that it never made. Second, BFS asks the Court to reconsider the procedural history of a Setoff Motion it never filed. Third, BFS asks the Court to reconsider a successive JNOV Motion that did not toll the appeal deadline. There is no basis to grant rehearing – much less an *En Banc* review – of these arguments which have already been rejected by this Court and which ultimately are immaterial because the Final Order ending this case stands.

BACKGROUND[1]

[1]Respondents incorporate their Motion to Dismiss and Final Brief which fully detail the extensive procedural history of this action. This history shows that BFS' appeal is untimely. A summary of the main points is included below.

This action concerns leaky windows supplied by BFS to the One Belle Hall Condominiums and the resulting, substantial damage. The case was tried before a jury in Charleston County between August 29, 2016 and September 1, 2016.

It is undisputed that at the conclusion of this trial:

- BFS failed to move for a directed verdict (R. p. 635:9-10);
- BFS made a JNOV Motion that was denied (R. p. 744:2-12);
- BFS did not request leave of court to file any other post-trial motions (R. p. 27); and,
- The Trial Court entered the Final Order that "end[ed] the case" and judgment against BFS in the same amount the jury awarded ($2,163,493) on the Association's breach of warranty and strict liability claims. (R. p. 28); *see also* (R. p. 22).

It is undisputed that thereafter:

- BFS filed a "Motion to Compel" – not a Motion for Setoff – on September 8, 2016 (R. pp. 4492-3); (R. p. 774) (BFS' post trial counsel conceding "[t]he motion is a motion to compel.");
- BFS filed a Second JNOV – which nowhere asks for the "reconsideration", "altering" or "amending" of BFS' first JNOV Motion – on September 12, 2016 (R pp. 4494-4506); and,
- BFS did not file a Rule 59(e) Motion specific to the Final Order.

It is undisputed that within thirty days after receiving the Final Order (or by October 28th):

- BFS did not serve its Notice of Appeal of this Order.

Rather, BFS waited almost two years before it finally served its Notice of Appeal on June 29, 2018.[2]

[2] According to this Notice, BFS appeals from the: (1) 2016 Final Order; (2) 2017 Order Denying BFS's Motion to Compel; and (3) 2018 Order Denying BFS' Motion to Reconsider (R. pp. 4673-75). The oral order denying the first JNOV motion after the jury was excused has not been appealed.

RETURN ARGUMENTS

This Court should deny BFS' Petition and *En Banc* Request for the following reasons:

I. BFS' Petition Improperly Rehashes the Same Arguments

BFS' Petition is yet another delay tactic that this Court should ignore. The Trial Court and this Court lost jurisdiction over this case five years ago. BFS' Petition rehashes the same flawed arguments BFS has made since then and therefore it should be rejected by this Court:

> Petitions for rehearing are filed in at least three-fourths of the cases decided by this court. Many of them, we fear, some time, are filed just for delay. It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a "rehash" of what the losing party has said before, matters which the court has already considered well and disposed of.

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933) (emphasis added); Rule 221(a), SCACR. Nevertheless, Respondents address these repetitive arguments below.

II. This Court's Dismissal Order Does Not "Misapprehend" the Final Order or Find that it "Denied" BFS' Motion to Compel

BFS argues that the Court "misapprehended" the *nunc pro tunc* effect of the Final Order. *See, e.g.*, (Petition, pp. 3-6); (BFS MTD Response, pp. 5-10); (BFS Brief, pp. 10-11); (BFS Reply Brief, pp. 1-5). This Court did not "misapprehend" anything. It correctly found that, even though BFS' Motion to Compel and Second JNOV Motion were filed within ten days of the Final Order, BFS's attempt to reverse the Final Order is untimely:

> [BFS] did not file a Rule 59(e), SCRCP, motion to reconsider **the final order** within ten days [of September 1, 2016], and [BFS] filed its notice of appeal [of the final order] with this court on July 2, 2018, almost two years later. Therefore, we agree this court does not have jurisdiction to hear this appeal. . .[BFS] filed [its Motion to Compel] on September 8, 2016. . .[BFS] also filed [its Second JNOV Motion] on September 1[2], 2016. . .We agree with the trial court and find [BFS'] post-trial motions did not stay the time for [BFS] to file its appeal.

(Dismissal Order) (emphasis added).

Ironically, it is BFS who is misconstruing findings to try to support its argument. To be clear, BFS' argument relies solely on a finding that this Court never made – that the Final Order "denied" BFS' post-trial motions. (Petition, p. 6). BFS obviously realizes this so it does not directly quote this Court's Order, and instead, phrases its argument in terms of "the Court appears to interpret the Final Order as denying [BFS'] motions" (Petition, p. 3); "the Court's suggestion that September 22, 2016. . .was instead the effective date of the judgment [misapprehends its *nunc pro tunc* effect]" (Petition, p. 5); and "any finding by this Court that the [Final Order] denied the [Motion to Compel] overlooks the trial court's ruling." (Petition, p. 6) (emphasis added). The Court's Order does not contain any such finding; BFS' argument is both repetitive and speculative; and therefore there is no basis for granting rehearing on this issue.

III. The Court's Dismissal Order Does Not Overlook Setoff

BFS next argues that the Court overlooked its purported right to set off. (Petition, pp. 6-8); (BFS MTD Response, pp. 5-10); (BFS Brief, pp. 10-13); (BFS Reply Brief, pp. 8-12). This issue also does not warrant rehearing for the following reasons.

A. The Court Correctly Found that BFS' Motion to Compel Did Not Stay the Time for Appeal

BFS' Petition does not challenge this Court's ruling that BFS' Motion to Compel "did not stay the time for [BFS] to file its appeal"(Dismissal Order). This is fatal to BFS because, in so conceding, BFS is also conceding that the only way this Court has jurisdiction to address the Final Order is if its Second JNOV Motion was proper. Unfortunately for BFS, its Second JNOV Motion is improper[3] and therefore the Final Order stands – regardless of whether BFS can raise setoff after both the Trial Court and this Court lost jurisdiction over the Order.

[3] *See* Section IV, *infra*.

1. The Judgment Stands Because it's the Law of the Case

First, the judgment stands because it is the law of the case. Under the law of the case doctrine, an unappealed ruling cannot be changed on appeal. *Atlantic Coast Buildings and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("While [a trial court's] calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case.") (emphasis added); *Jasdip Properties SC, LLC v. Richardson*, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011) ("The unappealed finding of the jury. . .right or wrong, is the law of the case."); *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998), *cert. denied* (June 18, 1998) (an unchallenged ruling "precludes consideration on appeal"); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App. 1997) (appellate court must assume an unappealed ruling is correct).

Here, there were only two "judgment rulings": (1) the Final Order entering the judgment; and, (2) the Trial Court's oral denial of BFS's first JNOV Motion. BFS did not timely appeal the Final Order and does not appeal the denial of its first JNOV Motion. (Notice of Appeal). As such, the judgment stands as the law of these and it's procedurally impossible for this Court to reverse the judgment because BFS did not challenge it. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("[D]ifferent preservation rules apply to an *appellant*—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.") (emphasis in original and added).

2. The Judgment Stands Under the Two-Issue Rule

Second, the judgment stands under the two-issue rule because the jury returned a general verdict that involved two or more issues and the verdict is supported as to at least one of these issues (breach of express warranty). *See Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (under the two-issue rule, when a jury returns a general verdict involving two or more issues, and the verdict is supported as to one issue, the verdict stands).[4]

The jury awarded the Association $2,163,493 on separate causes of action – strict liability and breach of warranty. As such, the Association may rely on either breach of express warranty, breach of implied warranty or strict liability in the context of analyzing whether the jury's verdict is supported despite BFS' setoff arguments. Breach of express warranty sounds in contract,[5] and is not subject to setoff under the joint tortfeasor statute. (MTC at 2); *Atkinson v. Orkin Exterminating Co.*, 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) ("Atkinson Order")[6] (holding the defendant was not entitled to setoff on an action sounding in contract) *aff'd*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding the defendant was not entitled to a setoff because the case involved duties arising out of two independent contracts). Because statutory setoff is not applicable to breach of express warranty verdicts, and the jury here returned such a verdict against BFS, the

[4] *See also Cole v. Raut*, 378 S.C. 398, 406, 378 S.E.2d 30, 34 (2008) ("The [two-issue] rule is consistent with the established notion that the appellate courts in this State exercise every reasonable presumption in favor of the validity of a general verdict.") (citations and quotations omitted).

[5] A seller's express warranty sounds in contract. S.C. Code § 36-2-313 (1976) ("Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."); *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002) (In a products defect case, "[b]reach of warranty is an action affirming the contract.").

[6] The *Atkinson* Order was attached to Respondents' Motion to Dismiss as Exhibit "J" at 109.

total damages the jury awarded (and the Trial Court also entered) stands regardless of whether setoff is applicable to the jury's strict liability or breach of implied warranty verdict.

Even assuming the Trial Court's "invocation of the two-issue rule [was] legally erroneous" because it "can only be invoked on appeal" as BFS contends, this error was harmless because this Court can apply this rule and should reach the same conclusion of the Trial Court – that the verdict rendered on the Association's breach of express warranty claim is supported because setoff does not apply to this verdict. (BFS Brief at 20).

B. BFS Subsequent Setoff Arguments Are Without Merit

BFS understands that its Motion to Compel did not stay BFS' time to appeal the Final Order so it argues that this Court has jurisdiction to consider setoff because setoff can be raised at any time and BFS raised setoff after final judgment was entered. (Petition, pp. 7-8). The problem with BFS' argument is multi-fold.

1. BFS Did Not Move for Setoff After it Received the Settlement Documents

First, BFS did not move for setoff after the November 18, 2016 and April 17, 2017 hearings on its Motion to Compel. (Petition, pp. 7-8) (claiming to have raised setoff immediately before or during these hearings). Notwithstanding the Trial Court's verbiage, the Trial Court granted BFS the relief it sought in its Motion to Compel. (2017 Order, R. p. 29, para. 13). At the April 20, 2017 hearing, the Trial Court compelled the production of the settlement agreements so that there would be an adequate record on appeal. BFS cannot claim to be aggrieved by this. After receiving the settlement agreements, BFS never moved for setoff or provided the Court with a proposed calculation of the setoff, perhaps evidencing BFS' realization that the ship had sailed.

2. Statutory Setoff Occurs Prior to Judgment

Second, BFS' Motion to Compel said BFS "would" move for *statutory* setoff – not equitable setoff – and this Court acknowledges that statutory setoff occurs prior to the Court's entry of judgment on a jury verdict. *Smith v. Widener*, 397 S.C. 468, 471-472, 724 S.E.2d 188, 190 (Ct. App. 2012) (noting "before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . .") (emphasis added).

Second, other statutes in South Carolina's Contribution Among Tortfeasors Act also require the "setoff" of "settlements received from any potential tortfeasor prior to a jury's verdict":

> (E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

S.C. Code §15-38-15(e) (emphasis added). Reading this and S.C. Code §15-38-50 together to conclude that setoff should be applied before a jury's verdict is the most logical way to effectuate the meaning and purpose of the Act.[7]

Third, it makes sense that setoff occurs prior to final judgment – versus after when a trial court, the fact finder, loses its jurisdiction over the case. Here, BFS never moved for setoff in the temporal, ten-day window it had to challenge final judgment; rather, it filed a Motion to Compel that said:

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[7] "The goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." *Clemson Univ. v. Speth*, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001). "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). In ascertaining intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Id.* Statutory provisions should be given a reasonable construction consistent with the purpose of the statute. *Estate of Moon v. City of Greer*, 348 S.C. 184. 188, 558 S.E.2d 527, 529 (Ct. App. 2002); *see also Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777. 779 (1997) ("We should consider. . .the word and its meaning. . .with the purpose of the whole statute and the policy of the law.").

> Plaintiff has reached settlement with all co-defendants except for BFS in exchange for releases or covenants not to execute. BFS is not in possession of the settlement terms or documents related thereto and moves before the Court to compel the production of [these documents]. Thereafter, pursuant to S.C. Code § 15-38-50, BFS will move to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury.

(R. p. 4493) (emphasis added); *see also* (R. p. 28). As such, the circuit court entered final judgment because it was unopposed, and this Court did not err in finding the same. (Dismissal Order).

Fourth, there is a fundamental unfairness in permitting BFS, a recalcitrant, non-settling defendant, to gain a monetary advantage by virtue of settlements that it seeks to setoff five years after the fact despite never properly raising this request. Rather than encouraging settlements, such an approach would encourage defendants in multi-party litigation ***not*** to settle but to instead vie to be the last one standing in the hope that other parties will pay more than their fair share of the verdict. This is contrary to South Carolina's "strong public policy favoring the settlement of disputes." *Chester v. S.C Dep't of Pub. Safety,* 388 S.C. 343, 346. 698 S.E.2d 559, 560 (2010).

3. BFS' *Ellis* and *Tilley* Arguments Are Without Merit

BFS relies on two cases, *Ellis* and *Tilley*, in support of its argument that setoff motions can be made at any time. (BFS Brief at 11-13) *citing Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003); *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). BFS' reliance is misplaced for multiple reasons.

First, both *Ellis* and *Tilley* were decided before this Court's 2012 decision in *Smith*.

Second, both *Ellis* and *Tilley* involved setoff motions that were actually made before jurisdiction was lost; and, neither involved an unchallenged verdict or an untimely Notice of Appeal. *Tilley*, 355 S.C. at 366-67, 585 S.E.2d at 294-95 ("The Court affirmed summary judgment on the issue of liability and remanded for a determination of damages. This appeal was taken following the circuit court's damage determination [which included deciding Pacesetter's setoff

request]") (emphasis added); *Ellis*, 335 S.C. at 109-10; 515 S.E.2d at 269-70 (indicating Doctor Oliver immediately appealed the "jury award" and "during the pendency of his appeal, he filed a motion seeking to reduce the jury's award by the amount of the settlement [Ellis] received from [hospital].") (emphasis added).

Third, *Ellis* involved a "negligence action" with joint "tortfeasors" and the settlement amount ultimately subtracted from Ellis's jury award equaled "the [hospital] bills incurred by Ellis as a result of the hospital's alleged negligence." *Ellis*, 335 S.C. at 109; 515 S.E.2d at 269 (emphasis added). Here, negligence is not at issue because BFS was not found liable in negligence.

Fourth, *Tilley* involved "equitable" setoff which is also not at issue because BFS failed to raise it. *Compare* (MTC Denial at 12) ("[BFS's] Motion specifically limits itself to statutory setoff, not equitable. In addition to not requesting equitable setoff in its [M]otion, BFS never plead equitable setoff in any of its three Answers.") *with* (BFS Brief at 12) (acknowledging *Tilley* involved equitable setoff).

Fifth, *Tilley* involved an order that still stood allowing the party seeking setoff to produce evidence showing its entitlement to setoff. *Tilley*, 355 S.C. at 377, 585 S.E.2d at 300 ("The circuit court's post-trial order requires Pacesetter to produce evidence of its entitlement to setoff prior to disbursement of funds, and that order still stands. In order to receive any setoff, Pacesetter will have to produce this evidence."). Here, there is no standing order from the Trial Court finding BFS is entitled to setoff so long as it produces certain evidence; rather, the Trial Court found BFS was not entitled setoff.

Sixth, the *Tilley* Court did not hold that setoff motions can be made at any time; rather, *Tilley* indicated that there was nothing precluding a defendant from raising setoff to the trial court between the liability and damages phases of a trial. *Tilley*, 355 S.C. at 377, 585 S.E.2d at 300

("[W]e see no reason why Pacesetter cannot request setoff before the circuit court during the damages portion of the case.") (emphasis added). BFS did not request setoff during any portion of this case; rather, it waited until after the case was over to file a Motion to Compel.

Seventh, the amount setoff in *Tilley* had nothing to do with joint tortfeasors or the same claims for the same damages; rather, prior to judgment, the trial court ordered that any damages awarded were to be setoff by unpaid debt already written off by a corporation. The trial court entered the judgment without making this reduction because it previously ordered that the corporation was entitled to setoff and it was just a question as to what amount should be setoff based upon the corporation's records. *Tilley*, 355 S.C. at 367, 585 S.E.2d at 295 ("[The trial court] ordered Pacesetter to pay damages in an amount equal to the total of the finance charges actually paid by Buyers in all of the consumer credit transactions. . .[The trial court] allowed Pacesetter to set off the damages owed by the amount of the unpaid debt written off by Pacesetter. . .The order calculated the total amount of the judgment, prior to setoff, to be $3,273,010.52"). Since there was a setoff motion made in *Tilley* before the damages phase of trial which the trial court ruled on before calculating the judgment, *Tilley*, like *Smith*, stands for the proposition that setoff is to occur before the judgment is entered. *Tilley*, *Smith*, *supra*. This is contrary to BFS's main argument that a court may decide setoff at any time – with or without a motion being made.

IV. This Court's Dismissal Order Correctly Found that BFS' Second JNOV Motion is a "Nullity" that Did Not Toll BFS' Time to Appeal the Final Order

BFS next argues that this Court erred in finding that its Second JNOV Motion is a "nullity". *See* (Petition, pp. 9-13); (BFS MTD Response, pp. 10-16); (BFS Brief, pp. 13-14); (BFS Reply Brief, pp. 6-7). This argument also does not warrant rehearing.

A. This Court Did Not Misunderstand the Facts

BFS' Second JNOV Motion is a "nullity" because it is successive motion that asks the court to again rule on issues already ruled upon or rule upon issues never raised. (R. pp. 4494-4505). BFS' Second JNOV Motion:

- Was not timely;
- Expressly moves the for "(1) JNOV" (R. p. 4494);
- Attempts to renew the directed verdict motion which was never made "at the close of the evidence in full." (R. p. 4494);
- Argues that "BFS is entitled to JNOV" without mention of the denial of BFS' first JNOV Motion. (R. pp. 4495-99);
- Indicates that "if the Trial Court denies BFS' JNOV Motion," BFS moves for a New Trial Absolute as its first alternative. (R. pp. 4499; 4503);
- Claims that "if the Trial Court denies both BFS' JNOV Motion and New Trial Absolute Motion, BFS moves for a New Trial Remittitur as its last alternative. (R. p. 4504); [8] and,
- Concludes without mentioning the words "alter," "amend", or "reconsideration" anywhere throughout its 12 pages. (R. pp. 4494-4505).

B. This Court Did Not Misapply the Law

South Carolina Courts are clear that successive JNOV Motions such as this are improper. In *Quality Trailer*, for example, our Supreme Court confronted a similar situation involving

[8] BFS later withdrew these New Trial motions in full as well as twenty of the grounds it initially asserted in support of its Second JNOV Motion. (BFS Brief at 4, n. 7). Notably, on appeal, BFS does not argue the remaining grounds it did not withdraw or that the Trial Court should have considered any aspect of its Second JNOV Motion. BFS' abandonment of these arguments is telling – if BFS truly believed that its Second JNOV Motion was properly made, why does BFS make no substantive JNOV argument on appeal? The answer is that BFS' post-trial counsel realizes the Second JNOV Motion is procedurally barred, but has no choice but to mischaracterize this Motion as a Rule 59(e) Motion and then try to bootstrap into the tolled-appeal window afforded to Rule 59(e) Motions.

successive JNOV Motions. *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002). *Quality Trailer* involved a dispute among trucking companies wherein the jury found against defendant trucking company ("I-Corp") on plaintiff trucking company's ("Quality Trailer") promissory estoppel and successor liability claims. *Id.* at 218, 562 S.E.2d 615. Following the jury's verdict, I-Corp made a timely, post-trial motion for JNOV and a new trial ("First Motion") which the court denied. *Id.* I-Corp later filed a Second Motion substantively identical to its First Motion, only altering "form" to make the Second Motion appear as if it were a Rule 59(e) Motion.[9] *Id.* at 218, 562 S.E.2d 615-16. The circuit court, recognizing the duplicity between the two motions, denied the Second Motion. *Id.* On appeal, our Supreme Court affirmed the circuit court, finding:

> Despite its caption, I Corp.'s second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion. . . .Notwithstanding its caption, the second motion did not ask for relief available pursuant to Rule 60, SCRCP. Rule 60 allows a motion for relief from the judgment based on a number of specific grounds. . . The second motion raised none of these grounds. . . I Corp. argues on appeal that the second motion was required to preserve issues raised, but not ruled upon, in the trial court's order denying JNOV and new trial. The second motion did not, however, identify a single issue raised but not ruled upon. . .The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.

Id. at 220-21, 562 S.E.2d 617-18 (emphasis added).[10]

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[9] I-Corp captioned its Second Motion as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for [JNOV] and Motion for New Trial" ("Second Motion"). The caption of the Second Motion indicated it was made pursuant to Rules 52, 59 and 60, SCRCP, and the relief requested was tailored to match; however, in all other aspects, I-Corp's Second Motion duplicated its First Motion. Like I-Corp, BFS's Second JNOV Motion is not, in substance, a Rule 59(e) Motion. (R. pp. 4494-4505).

[10] *See also Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (finding written post-trial motion, which followed post-trial motion made at the end of the trial, was an improper successive motion); *Coward Hund Construction Company v. Ball Corporation*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (finding post-trial motion successive because it "did not challenge a new ruling") (emphasis added).

Quality Trailer and its progeny "clearly stand for the proposition that a successive post-trial motion" is only proper in a limited context: it must arise "as a result of an order following an initial post-trial motion that alters or amends the judgment." *Collins,* 353 S.C. at 564, 579 S.E.2d at 526 (emphasis added); *Coward Hund,* 336 S.C. at 3, 518 S.E.2d at 58 ("A second motion. . .is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion. . .") (emphasis added).

Here, there is no order altering or amending either the denial of BFS' first JNOV Motion or the Final Order because BFS never filed a Rule 59(e) Motion. (R. p. 22; 744:2-12). BFS filed another JNOV Motion instead and its appeal clock expired.

C. BFS' Reliance on *Elam* and *Fields* is Misplaced

BFS' reliance on *Elam* frankly makes no sense since it "reaffirms" the above "rationale and principles". *Elam,* 361 S.C. at 21, 602 S.E.2d at 778 ("affirming principles set forth in *Coward Hund*, *Quality Trailer*, and *Collins Music*" and noting "[w]e view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's 'single bite at the apple' in presenting his case.") (emphasis added). *Elam* is not creating a bright-line distinction between "written" and "oral" post-trial motions or saying that "only Rule 59(e) Motions" are capable of being successive as BFS claims. (Petition, pp. 10-11). *Elam* is simply saying that where a JNOV Motion is made – it must be followed by a proper Rule 59(e) Motion – to toll the time for appeal.

BFS' claim that the Supreme Court addressed this "exact scenario" in *Fields* is also false. (Petition, p. 12) *citing Fields v. Regional Medical Center Orangeburg,* 363 S.C. 19, 609 S.E.2d 506 (2005). The circumstances in *Fields* are entirely different from those here because: (1) BFS did not renew its directed verdict motions whereas Fields did; (2) BFS did not request ten

days to file a written JNOV Motion whereas Fields did; and, (3) BFS did not support its first JNOV Motion with specific grounds whereas Fields did.

The *Fields* Court also did not find the entirety of the second JNOV Motion at issue there proper; rather, the Court found only certain grounds, relating to evidentiary rulings, were properly raised because only these grounds were stated in support of the first JNOV Motion. Where, like here, no specific grounds are raised in support of an initial JNOV Motion, it follows that all grounds newly raised in a second JNOV motion are improper.

D. This Court Did Not Err in Citing *Wright v. Craft*

BFS also does not dispute that this Court is ultimately barred from reviewing its Second JNOV Motion because BFS failed to make a directed verdict motion at the close of all evidence as required. (R. p. 635:9-10) (The circuit court asking BFS if it had any motions at the close of the evidence, and BFS responding "No"); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (holding when a defendant fails to move for directed verdict at the close of all evidence, an appellate court is precluded from reviewing both the denial of prior directed verdict motions and any subsequent JNOV motions).[11]

Rather, BFS argues that this is a "preservation" issue versus a "jurisdictional" issue and that this Court erred in failing to make this distinction. Any error this Court has purportedly committed is harmless. Essentially, BFS is asking the Court to reinstate the appeal just so that the Court can rule that this issue is not preserved for review. This is a waste of this Court's time.

[11] This Court also cannot review the denial of BFS' first JNOV Motion because BFS does not appeal this denial. (R. p. 744:2-12); *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 542-43 (2014) ("As a matter of procedure. . .Appellants have only appealed. . .the Dismissal Order. As such, the merits of the underlying discovery orders. . .are not before us for consideration.") (emphasis added).

V. This Court Should Deny BFS' *En Banc* Request

BFS finally argues that this Court should grant its *En Banc* Request because its Petition addresses two issues of "exceptional importance" – (1) *nunc pro tunc* orders; and (2) successive and unpreserved JNOV motions. (Petition, p. 1, n. 1). These issues are not novel, and it is not necessary for all judges to consider them to "secure and maintain uniformity" in this Court's decisions. Rule 219(b), SCACR. This Court has already decided these issues and correctly dismissed this appeal in line with these decisions. Therefore, BFS' *En Banc* Request should be denied.

CONCLUSION

In sum, this Court should deny BFS' Petition and *En Banc* Request because it correctly dismissed this appeal for lack of jurisdiction because BFS failed to timely appeal the Final Order ending this action. Even if this Court had jurisdiction over this appeal, the only substantive question raised by BFS, whether it is entitled to a setoff, is immaterial because judgment against BFS stands under the law of the case doctrine and the two-issue rule. Even if this were not the case, BFS is not entitled to setoff the judgment on the merits because: (1) BFS is not a "joint tortfeasor"; (2) BFS owed independent obligations which resulted in independent damages; (2) BFS contractually assumed sole responsibility for all damages awarded and waived its ability to setoff these damages; (3) BFS admits the damages at issue are "divisible," and thus, capable of individual allocation; (4) BFS effectively tried damage allocation and setoff by consent in asking the jury to allocate fault and damages; (5) BFS waived its right to challenge the jury's verdict, waiving its ability to setoff the verdict; and, (6) setoff is not necessary to provide justice between

these parties.[12] Because BFS is precluded, both procedurally and substantively, from seeking setoff, BFS's appeal is without merit.

JUSTIN O'TOOLE LUCEY, P.A.

By: /s/ Justin O'Toole Lucey

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April 21, 2021
Mount Pleasant, South Carolina

[12] These arguments are fully detailed in Plaintiffs' Motion to Dismiss and Final Brief.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594
Appellate Case No.: 2018-001230

One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated,

Respondents,

v.

Builders FirstSource-Southeast Group, LLC, Appellant.

PROOF OF SERVICE

I, the undersigned paralegal for Justin O'Toole Lucey, P.A., hereby certify that on April 21, 2021, I served a copy of **RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING** upon all parties to this matter by email to counsel of record as follows:

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April 21, 2021

Via E-Mail Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually and on behalf of all others similarly situated vs. Builders FirstSource-Southeast Group, LLC
Appellate Case No.: 2018-001230

Dear Ms. Kitchings:

Enclosed please find *Respondents' Return to Appellant's Petition for Rehearing* in the above-referenced matter.

By copy of this letter to all counsel, we are hereby serving them with a copy of the Return via email as referenced below.

Best regards,

/s/ Jennifer Zambriczki

Jennifer Zambriczki

DL/jz
Enclosures (as stated)
cc w/ encl.: C. Mitchell Brown, Esquire (mitch.brown@nelsonmullins.com)
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