THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

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, ... Petitioner/Appellant.

REPLY IN SUPPORT OF PETITION FOR REHEARING

This Court has jurisdiction over this appeal. Builders FirstSource-Southeast Group, LLC ("Builders") timely appealed the trial court's denial of its setoff rights, and it has a right to have this Court affirm or reverse the trial court's rulings. The trial court referenced, but did not rule on, Builders' September 12, 2016 Motion for Judgment, New Trial Absolute, or, in the Alternative, for New Trial *Nisi Remittitur*—calling it a "nullity"—in a footnote in its November 16, 2017 Order. (Order p. 6 n.3, R. 31). Builders has correctly maintained thereafter that this is error, and that the trial court should rule on the motion and not treat it as a nullity. This Court's dismissal order treating the September 12 motion as a "successive JNOV motion that was a nullity in the eyes of the law and did not suspend the time for appeal," is likewise in error and overlooks and misapprehends the motion and South Carolina law.

Respondents' return raises numerous arguments addressing the merits of the setoff issues, purported grounds for affirming the trial court, and insignificant distinctions between this case and the cases relied upon in Builders' petition for rehearing. But Respondents fail to defend the dismissal of this appeal. This Court should grant rehearing or rehearing *en banc* and reinstate this appeal.

Argument

I. Builders timely moved for setoff and appealed the denial of its setoff rights.

Builders timely moved for setoff, as it explained in its petition. *See* (Petition at 6–8) (explaining the timing and timeliness of Builders' multiple requests for setoff). Respondents ask this Court to find that Builders was required to move for setoff before the trial court entered judgment on the verdict or that Builders was required to renew its setoff request for a fifth time after the trial court ordered production of settlement documents. (Return at 8–12). No law supports Respondents' arguments.[1] Rule 58(a)(1), SCRCP, requires the clerk (unless otherwise instructed by the court) to "forthwith" prepare and "enter" a judgment after a jury verdict. Respondents would have this Court fashion a rule that if no one has moved for a setoff before that occurs, it is too late to do so. Further, if the Court has failed to do its duty to apply setoff prior to entry of the judgment, Respondents would say the set off motion is too late. That is not the law.

In attempting to create these new rules regarding setoff, Respondents first rely on *Smith v. Widener*, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012). However, *Smith* did not

[1] Contrary to Respondents' arguments and this Court's dismissal order, Builders was not required to renew its setoff motion after the trial court ordered production of settlement information. Builders already had a setoff motion pending, and Respondents cite no authority—because there is no authority—for the new rule they wish to create that the production of settlement information somehow canceled the pending setoff motion and created a new obligation to move (again) for setoff.

address the required timing of a setoff motion. The sentence Respondents quote from *Smith* states the basic proposition that a trial court is required to apply the statutory setoff before entering judgment on a verdict:

> A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15–38–50(1) (2005). Therefore, 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, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury.

Id. Similarly, section 15-38-15, on which Respondents rely, requires that amounts the plaintiffs received in settlement before the verdict must be set off. S.C. Code Ann. § 15-38-15(E) (providing that notwithstanding the apportionment of fault required by statute, "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 for setoff of any settlement ***received . . . prior to the verdict***" (emphasis added)). The statute says nothing about the timing of a setoff motion.

Respondents' only argument is that since the trial court was required to apply the statutory setoff prior to entering judgment on the verdict, Builders must be required to file its motion for setoff prior to the entry of the judgment. But this is incorrect. First, the trial court has a duty ***imposed by law*** to apply the setoff, even in the absence of a motion, according to the very authorities cited by Respondents. Here, the trial court failed to do so, as Builders argued in its briefing. Under Respondents' logic, an aggrieved party would have no remedy if a trial court enters judgment on a jury verdict without applying the mandatory statutory setoff. No authority supports Respondents' argument. Moreover, under the facts of this case, neither the clerk nor the Court literally entered any judgment prior to the motion for setoff being filed. It is doubly unfair to say the Court can issue a *nunc pro tunc* order and thereby render a motion untimely filed. The

simple truth here is that Builders timely moved for setoff, and the trial court erred in denying Builders' setoff rights.

Respondents' efforts to distinguish *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), and *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003), also fail. The only purported distinctions material to the issue here are Respondents' arguments that "*Ellis* and *Tilley* were decided before this Court's 2012 decision in *Smith*" and that "*Ellis* and *Tilley* involved setoff motions that were actually made before jurisdiction is lost." (Return at 10). However, because *Smith* did not impose any timing requirement for a setoff motion, it did not overrule *Ellis* or *Tilley* in any respect. Moreover, this Court's decision in *Smith* could not have overruled any aspect of the Supreme Court's decision in *Tilley*.

In *Ellis*, this Court stated only that the appellant moved for setoff after it appealed the jury verdict; the Court did not state that the appellant moved (or must move) for setoff prior to entry of judgment on the verdict.[2] 335 S.C. at 108–09, 515 S.E.2d at 269–70. In *Tilley*, the Supreme Court rejected an argument that a party's setoff request was untimely because it came after the trial court's summary judgment ruling. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 376–77, 585 S.E.2d 292, 300 (2003). The court did not hold that a setoff motion must be made before the entry of judgment on a jury verdict. The ***fact*** that the party in *Tilley* moved for setoff before judgment on the *damages* verdict does not create ***law*** that a party must do the same in every case. Respondents'

[2] Further, to the extent Respondents argue Builders was required to file a setoff motion "in the temporal, ten-day window it had to challenge final judgment," (Return at 9), this Court rejected that exact argument in *Ellis*. *See* 335 S.C. at 109, 112, 515 S.E.2d at 270, 271 ("Mrs. Ellis first argues that the trial court erred by not requiring Dr. Oliver to follow the rules of civil procedure in requesting the set-off. She contends the trial court erred by not treating Dr. Oliver's motion for set-off as an untimely Rule 59(e) motion. We disagree. . . . Mrs. Ellis's agreement to release Richland Memorial discharged a portion of the judgment against Dr. Oliver by operation of law without the need to file a motion under the South Carolina Rules of Civil Procedure. The set-off was statutorily mandated and thus properly applied.").

remaining purported distinctions do not address or affect the timing of a motion for setoff and are therefore immaterial to a determination regarding whether this Court has jurisdiction over this appeal. *See* (Return at 10–12).

Finally, Builders recognizes that the lack of a deadline to file a setoff motion may not create a limitless right to move for setoff at any time in the future, and the courts may eventually confront a setoff motion that is so delayed as to be untimely. But that is not the case here. Builders moved in a timely fashion and the Court need not—and should not—confront that issue in this case.

Builders filed its motion to compel and for determination of setoff on September 8, 2016—one week after the verdict. (R. 4492–93). The last sentence of that motion (stating Builders "will move" for setoff) may be inartfully worded, but it was clear from the motion that Builders was seeking a setoff. (*Id.*). On November 17 and 18, 2016, Builders filed a memorandum in support of its motion expressly seeking both statutory and equitable setoff, then repeated its arguments orally at a hearing and made an oral setoff motion to the extent the trial court deemed the motion not yet made. (R. 774–75, 4581–86). The parties and the trial court were thus on notice one week after the verdict that Builders was seeking setoff, and the trial court even scheduled and held a hearing on the issue. No timeliness problem exists.

The result of Respondents' arguments and the trial court's and this Court's rulings is to create a procedural trap where—although the law expressly states that a setoff motion need not be made at any particular time but instead arises by operation of law—if a party does not file a motion within some unidentified time, then it forever loses its setoff rights and any right to appeal the denial of a setoff. This inequitable result cannot stand in the face of the following:

(1) this Court's holding in *Ellis* that a party is not required to move for setoff within ten days under the South Carolina Rules of Civil Procedure, *see* note 2, *supra*;

(2) this Court's holding in *Ellis* that the setoff statute does not require that a motion be made at any particular juncture in the litigation, *see* 335 S.C. at 110, 515 S.E.2d at 270; and

(3) the well-settled rule that setoff rights arise by operation of law, *see id.* at 112, 515 S.E.2d at 271; *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018) ("There is no right to setoff until there is a verdict against a defendant. Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any."); *Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 437, 803 S.E.2d 475, 482 (Ct. App. 2017); *Smith v. Widener*, 397 S.C. at 472, 724 S.E.2d at 190.

This Court should reinstate this appeal and address the trial court's error in failing to apply the mandatory setoff and in denying Builders' motions for setoff.

II. Builders properly filed a single motion to reconsider the trial court's JNOV ruling.

Respondents misapply the principles established by "*Quality Trailer* and its progeny." (Return at 13–15). In *Elam*, the Supreme Court clarified the general rule that a party is entitled to file an initial Rule 59(e) motion after the denial of its JNOV or new trial motion. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). *Quality Trailer*[3] presents a narrow "exception" to that general rule, according to *Elam*: "[a]n appeal . . . may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—recaptions a ***written JNOV/new trial motion***, which has been ruled on, and resubmits it as a virtually identical, ***written Rule 59(e) motion***." *Elam*, 361 S.C. at 20, 602 S.E.2d at 778 (emphases added). Although the Supreme Court found *Quality Trailer* was properly decided, it clarified that the law allows a party to file an initial Rule 59(e) motion raising the same grounds it raised in a JNOV/new trial motion ***and*** rejected the exact argument Respondents raise in their return:

> We have found no foreign case similarly postured to the present case or *Matthews*, i.e., a case in which a court held a written Rule 59(e) motion following an oral JNOV/new trial motion did not toll the

[3] *Quality Trailer Prod., Inc. v. CSL Equip. Co.*, 349 S.C. 216, 218, 562 S.E.2d 615, 616 (2002).

> time for appeal. . . . After studied review, we reject the rationale and result reached by the Court of Appeals in the present case and in *Matthews*. We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we 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 to the trial court.

Elam, 361 S.C. at 21, 602 S.E.2d at 778. Like the appealing party's motion in *Elam*, Builders' motion is "not factually similar to *Quality Trailer* or *Collins Music* because [Builders] did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a ***previous, written*** JNOV/new trial motion." *Elam*, 361 S.C. at 26, 602 S.E.2d at 781 (emphasis added). This Court should not apply this "unwarranted expansion of *Quality Trailer*" advocated by Respondents. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. The Supreme Court's clarification of the law in *Elam* is binding on this Court and the trial court. Builders' written motion filed on September 12, 2016, was not an improper, successive, duplicative, written motion.

Respondents also incorrectly argue that Builders' motion was proper only if the trial court altered or amended some aspect of the original judgment. (Return at 15). This argument again misconstrues *Elam*. According to the Supreme Court, a party may file a ***successive***—meaning a ***second***—Rule 59(e) motion only if the trial court's ruling on a ***first*** Rule 59(e) motion altered the original judgment. *Elam*, 361 S.C. at 20, 602 S.E.2d at 778 ("An appeal may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment."). This principle is inapplicable

entirely to this case. It applies only where a party files two ***Rule 59(e)*** motions. It does not apply in this case because Builders filed a single written motion which sought reconsideration of the trial court's oral ruling on its JNOV motion.

Finally, Respondents' attempts to distinguish *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 27–28, 609 S.E.2d 506, 510 (2005), are erroneous. First, any failure to renew a directed verdict motion or to support a JNOV motion with specific grounds[4] is a preservation issue, not a jurisdictional issue. *See Wright v. Craft*, 372 S.C. 1, 19–20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("Craft moved for a directed verdict at the close of Wright's case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft's motion is ***not preserved*** for our review." (emphasis added)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be ***preserved*** for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." (emphasis added) (citation omitted)).

Respondents confuse "claim-processing" rules with jurisdictional requirements. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (distinguishing between non-jurisdictional "claim-processing" rules and mandatory jurisdictional requirements provided by statute). The law of the case doctrine, the two-issue rule, and issue preservation principles are not jurisdictional and, therefore, are not grounds for dismissal. Instead, those doctrines may constitute grounds to ***affirm*** a trial court's ruling under certain circumstances. *See, e.g.*, *Judy v.*

[4] Contrary to Respondents' argument, (Return at 15–16), Builders in fact supported its oral JNOV motion with specific grounds. Although Builders' trial counsel did not recite each of the grounds in the JNOV motion, she made the motion by renewing the grounds she stated in her prior directed verdict motion. (R. 744) (renewing the grounds for directed verdict); (R. 493–94) (raising grounds for a directed verdict).

Martin, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) (affirming a trial court's ruling based on the law of the case doctrine);[5] *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will ***affirm*** unless the appellant appeals all grounds because the unappealed ground will become law of the case." (emphasis added)); *Wright*, 372 S.C. at 19–20, 640 S.E.2d at 496 (affirming a directed verdict ruling because the appellant failed to preserve it for appellate review). Respondents' arguments based on these principles are therefore irrelevant to the single issue before the Court at this stage—whether Builders' service of its notice of appeal was timely.

Second, Builders was not required to request leave of court to file its setoff and (what should be treated as) Rule 59(e) motions. *See* (Return at 3, 15–16). That leave of court requirement applies only where a party seeks to make a JNOV or new trial motion within ten days after the verdict, rather than immediately after the jury is discharged. *See* Rule 50(e), SCRCP ("The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."); Rule 59(b), SCRCP ("The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."). Builders made a JNOV motion immediately after the jury was discharged. (R. 744). It was not required to request leave of court to file a Rule 59(e) motion or a setoff motion. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). Moreover, the trial

[5] *See also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("[T]he phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, ***not a limit to their power***." (emphasis added)).

court ***denied*** the moving party's request for ten days in *Fields*, and the fact that the party made the request is therefore irrelevant to the analysis. 363 S.C. at 26, 609 S.E.2d at 509–10.

Fields addressed the exact circumstances at issue in this case and is binding on this Court and the trial court. *See* (Petition at 12–13) (explaining *Fields*). *Fields* mandates that Builders' written JNOV motion be treated as a properly-filed Rule 59(e) motion which stayed the time for Builders to appeal the verdict and judgment. 363 S.C. at 27, 609 S.E.2d at 510 ("It is proper to treat Plaintiff's written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial."). Builders' motion has not been ruled on by the trial court. Again, Builders has correctly maintained that the trial court should rule on the motion and not treat it as a nullity. This Court's dismissal order treating the September 12 motion as a "successive JNOV motion that was a nullity in the eyes of the law and did not suspend the time for appeal," is in error and overlooks and misapprehends the motion and South Carolina law.

Finally, contrary to Respondents' argument, (Return at 16), the erroneous dismissal of an appeal for lack of jurisdiction is not harmless merely because Respondents claim some issues are unpreserved. This Court has jurisdiction over this appeal, and Builders therefore has a right to an opinion affirming or reversing the trial court's rulings, including its refusal to even consider what should be treated as a Rule 59(e) motion, as well as the setoff denial ruling.

III. Respondents are incorrect about the "Final Order."

Respondents alternately argue Builders is improperly attempting to "reverse the Final Order" and that Builders abandoned any challenge to the judgment by not appealing the denial of its JNOV motion. *See, e.g.*, (Return at 4–5, 6, 13 n. 8). Neither proposition is correct. Builders included the Form 4 *nunc pro tunc* order in its notice of appeal because the order must be reversed, as, *inter alia*, it enters judgment on the jury's verdict without applying the required setoff. The

appeal of that judgment should have been recognized as stayed by the timely filing of what should have been considered (per *Fields*) a Rule 59(e) motion. The trial court's refusal to consider the Rule 59(e) motion is an error, as Builders has argued. Further, the motion for setoff was filed and denied by separate order, literally, for a variety of reasons. Builders moved to reconsider that order as well, and after receipt of the denial of that motion to reconsider, timely appealed it.

Builders did not fail to appeal the JNOV ruling or concede that an appeal from that ruling would be untimely, and Builders did not concede that its setoff motion "did not stay the time for [Builders] to file its appeal." (Return at 5). Builders expressly argued in its petition that it was not required to appeal the setoff issue until the trial court denied its right to setoff and denied Builders' Rule 59(e) motion seeking reconsideration of the setoff ruling. (Petition at 6–8). This Court has jurisdiction over this appeal.

Respondents also incorrectly accuse Builders of misconstruing this Court's dismissal order by reading into it a finding that the *nunc pro tunc* order denied Builders' post-trial motions. In doing so, Respondents use bracketed language to alter this Court's order. Respondents quote the order as finding "[BFS] did not file a Rule 59(e), SCRCP motion to reconsider the final order within ten days [of September 1, 2016]." (Return at 4) (brackets inserted by Respondents) (emphasis removed). However, this Court found Builders was required to file a Rule 59(e) motion within ten days after receiving the *nunc pro tunc* order on September 27, 2016, ***not*** within ten days after the September 1, 2016 *nunc pro tunc* date written on the order:

> Builders received written notice of the September 22, 2016 Form 4 order on September 27, 2016. Thus, [Builders] was required to either move for reconsideration of the final order ***within ten days after receipt, by October 10, 2016***, or appeal the final order within thirty days after receipt, by October 28, 2016. [Builders] did not file a Rule 59(e), SCRCP, motion to reconsider the final order within ten days, and [Builders] filed its notice of appeal with this court on July 2, 2018, almost two years later.

(Dismissal Order at 1) (emphasis added). This Court's finding—and Respondents' attempt to rewrite it—is meaningful. It highlights the error in this Court's dismissal order. If the *nunc pro tunc* order is deemed entered on September 1, 2016, as it must be, then Builders' September 8, 2016 setoff motion and September 12, 2016 JNOV motion (which should be treated as Rule 59(e) motion) were timely filed and stayed the time to appeal. The September 27, 2016 date on which Builders received the *nunc pro tunc* order has significance only if the order is considered somehow as having denied Builders' pending post-trial motions and thus triggered the deadline to appeal. This cannot be. The order is a *nunc pro tunc* order. It cannot have properly ruled on motions filed after its effective date. Accordingly, by finding Builders' appeal is untimely because it did not file a Rule 59(e) motion within ten days after September 27, 2016, this Court misapprehended or overlooked the post-trial filings, the procedural history of this case, and the effect of a *nunc pro tunc* order, as Builders explained in its petition. (Petition at 2–6).[6]

Conclusion

Builders requests that the Court grant rehearing, reinstate this appeal, address the merits of the setoff issues raised by Builders, and reverse the trial court's denial of Builders' right to setoff. The Court should also order that the trial court address what should have been treated as Builders' Rule 59(e) motion. Builders further requests that the Court grant rehearing *en banc* for the reasons stated in Builders' petition for rehearing.

[6] Respondents incorrectly argue Builders' petition for rehearing is a "delay tactic" and rely on a case from 1933—long before the adoption of the South Carolina Appellate Court Rules. (Return at 4). Builders makes its rehearing arguments in good faith and, as is required by the rules, to preserve its right to file a petition for writ of certiorari with the Supreme Court.

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