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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rules 242 and 240 of the South Carolina Appellate Court Rules, Petitioner Builders FirstSource-Southeast Group, LLC ("Builders") hereby petitions this Court to issue a writ of certiorari to review the Court of Appeals' improper dismissal of Builders' appeal.

The Court of Appeals' dismissal of this appeal directly conflicts this Court's binding precedent in *Elam v. South Carolina Department of Transportation*[1] and *Fields v. Regional Medical Center of Orangeburg*.[2] Accordingly, this Court should grant certiorari, vacate the dismissal order, and reinstate Builders' appeal. *See* Rule 242(b), SCACR. If this Court declines

[1] 361 S.C. 9, 602 S.E.2d 772 (2004).
[2] 363 S.C. 19, 609 S.E.2d 506 (2005).

to review this matter, the Court of Appeals will likely continue to misapply this Court's binding precedents in other cases, and thus a grant of certiorari is necessary to ensure appellate jurisdiction jurisprudence is uniformly and fairly applied to litigants. The Court should then either transfer the appeal from the Court of Appeals and address the merits of Builders' appeal in the interest of judicial economy, or direct the Court of Appeals to consider the merits.[3]

Builders timely appealed the trial court's orders denying Builders' right to setoff and granting judgment to Respondents. The Court of Appeals erroneously dismissed Builders' appeal on the ground that Builders failed to timely serve its notice of appeal. Although aspects of the procedural history of this case from the verdict through the notice of appeal are unusual, a thorough analysis of the procedural history shows that Builders timely moved for setoff (despite the law providing that setoff rights arise by operation of law and a setoff motion need not be made at any particular time), timely moved to alter or amend the trial court's denial of Builders' setoff rights, and timely appealed after the trial court denied Builders' motion to alter or amend.

Question Presented for Review

Did the Court of Appeals err in dismissing Builders' appeal on the ground that Builders failed to timely serve its notice of appeal?

Statement of the Case

This is a construction defect case brought by the One Belle Hall Property Owners Association and individual property owners against numerous defendants having various roles in the construction of One Belle Hall, including Builders, which ordered the windows installed at One Belle Hall by placing an order with the window manufacturer, as specified by the general

[3] Counsel for Builders certifies that Builders filed a petition for rehearing and reinstatement in the Court of Appeals, and the Court of Appeals denied the petition on June 15, 2021.

contractor, and having the windows drop-shipped to One Belle Hall. (R. 480–88). The plaintiffs asserted three causes of action—negligence, strict liability, and breach of warranty—and alleged "latent building defects," "repeated water intrusion," and other general consequential damages. (R. 51–52). Prior to trial, the plaintiffs entered into settlements with most of the defendants totaling almost $9,500,000. By the time the case was called for trial, only Builders remained an active defendant.

The parties tried the case over four days from August 29 through September 1, 2016. *See generally* (R. 187–744). On the afternoon of September 1, 2016, Charleston County announced the closure of county offices—including the courthouse—the following day, September 2, 2016, due to the approach of Hurricane Hermine.[4] Following testimony, motions, closing arguments, and jury instructions throughout the day on Thursday, September 1, 2016, the jury received the case at 6:25 p.m. (R. 738).

The jury returned its verdict at 10:20 p.m. on September 1. (R. 739). It found for Builders on the plaintiffs' negligence cause of action, but it found for the plaintiffs on their strict liability and breach of warranty causes of action and awarded $2,163,493 in damages. (R. 46, 743–44). After reading the verdict, the trial court thanked the jury for working to reach a verdict ahead of the approaching storm: "It is not my policy to ask jurors to remain this late but due to the weather I really appreciate you all hanging with us and working so hard." (R. 741). The trial court discharged the jury at 10:24 p.m. (R. 743). Builders' trial counsel then orally moved for judgment notwithstanding the verdict by renewing the grounds she had previously raised in her directed verdict motion. (R. 744). The trial court orally denied the motion, and the trial adjourned at 10:30 p.m. (R. 744). The trial court and clerk of court did not "forthwith prepare, sign, and enter the

[4] *See* https://charlestonbusiness.com/news/education/70393.

judgment" on the jury's verdict as required by Rule 58 of the South Carolina Rules of Civil Procedure.

On September 8, 2016, Builders filed a written motion titled "Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Setoff." (R. 4492–93). In the motion, Builders stated,

> Builders . . . respectfully submits this Motion to Compel and Motion for Determination of Setoff. . . . Plaintiff has reached settlements with all co-defendants except [Builders] in exchange for releases or covenants not to execute. [Builders] is not in possession of the settlement terms or documents related thereto and moves before the Court to compel the production of the various releases or covenants not to execute granted by Plaintiffs to each co-defendant. Thereafter, pursuant to S.C. Code § 15-38-50, [Builders] 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. 4492–93). Builders filed another written motion on September 12, 2016,[5] captioned as a "Motion for Judgment, New Trial, New Trial *Nisi Remittitur*," raising various grounds for JNOV, a new trial absolute, or a reduction of the verdict via a new trial *nisi remittitur*. (R. 4494–4506).

On September 22, 2016, the trial court entered a Form 4 judgment on the jury's verdict and dated the order "9-1-2016 *nunc pro tunc*." (R. 22–23). The order entered judgment on the verdict but addressed nothing else:

> Statement of Judgment by the Court: "We the jury find for the Plaintiffs on the following causes of action: Strick [sic] Liability and Breach of Warranty. And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand Four Hundred Ninety-Three Dollars ($2,163,493.00) in actual and compensatory damages." The forgoing was the verdict.

(R. 22).

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[5] Builders filed its motion within ten days after the trial court's September 1 oral denial of its oral JNOV motion. The tenth day after September 1 fell on Sunday, September 11, and the deadline therefore extended to Monday, September 12. *See* Rule 6(a), SCRCP.

Builders served and filed a Memorandum in Support of Its Motion to Compel Production of Settlement Agreements and Motion for Setoff on November 17, 2016. (R. 4581). In the memorandum, Builders expressly requested that the trial court "grant the motion and ***setoff amounts received by Plaintiffs from settling co-defendants from the verdict*** rendered against [Builders]" and argued setoff "is required by statute and by common law equitable principles." (R. 4581, 4583) (emphasis added). Builders served and filed a Memorandum in Support of its Motion for JNOV, New Trial, New Trial Absolute, or, in the alternative, for New Trial *Nisi Remittitur* on the same day. (R. 4587).

The trial court held a motions hearing addressing the setoff motion the following day, November 18. *See generally* (R. 745–805). At the hearing, the parties argued the merits of Builders' entitlement to setoff and addressed the plaintiffs' arguments that the setoff motion was procedurally flawed. (*Id.*). Counsel for Builders also orally moved for statutory and equitable setoff to the extent the trial court found a motion had not previously been made. (R. 774–75). Because the parties did not yet possess a complete copy of the trial transcript, the trial court held the setoff motion in abeyance, adjourned the hearing, and directed the parties to obtain the transcript and request another hearing after reviewing the transcript. (R. 804–05).

Upon receiving the completed trial transcript, Builders' appellate counsel learned for the first time that, in the oral JNOV motion made immediately after the verdict, Builders had not raised all of the grounds asserted in the written post-trial JNOV and new trial motion and memorandum and had not moved for new trial absolute or new trial *nisi remittitur*. Consequently, Builders withdrew its new trial motions and JNOV grounds not raised at trial in a supplemental memorandum filed on April 19, 2017. (R. 4618–23). However, Builders maintained seven

grounds for JNOV and asserted that the trial court should reconsider its denial of Builders' JNOV motion by reviewing the written JNOV motion. (*Id.*).

The trial court held a second motions hearing on April 20, 2017, at which it heard additional argument on the merits of Builders' setoff motion and the plaintiffs' arguments that the motion was procedurally flawed. *See generally* (R. 808–73). The trial court also heard arguments on the merits and procedure of Builders' other post-trial motions. *See* (*id.*). The plaintiffs argued Builders' September 12, 2016 motion for JNOV or new trial was an improper, successive JNOV motion and was therefore procedurally barred. (R. 810–15). Builders argued, based on this Court's holding in *Fields v. Regional Medical Center of Orangeburg* and Builders' supplemental memorandum withdrawing unpreserved grounds and requesting reconsideration of the trial court's oral JNOV ruling, that the September 12 motion must be deemed a timely Rule 59(e) motion to reconsider. (R. 808–10, 815–21).

On November 27, 2017, Builders received written notice that the trial court entered an order denying Builders' motion for setoff. (R. 26–44) (order denying setoff); (R. 4624) (noting Builders received written notice of the filed order on November 27, 2017). The trial court found Builders' setoff motion was procedurally barred because Builders did not move to reconsider the *nunc pro tunc* order signed on September 22, 2016, (R. 29–31), and Builders was not entitled to setoff on the merits on several grounds, (R. 31–44). The trial court also found Builders' September 12, 2016 motion for JNOV or new trial was "a successive JNOV motion" and "a nullity in the eyes of the law" which "did not suspend the time for appeal or preserve the jurisdiction of [the trial court]." (R. 31 n.3). The trial court did not rule on—and still has not ruled on—the September 12 motion.

Builders served a motion to alter or amend the order denying setoff within ten days after entry of the order, on December 7, 2017. (R. 4624–48). The trial court entered an order denying Builders' motion to alter or amend the setoff ruling without further comment on June 27, 2018, (R. 45), and Builders served its notice of appeal two days later.

After Builders filed its initial appellant's brief at the Court of Appeals, the plaintiffs moved to dismiss Builders' appeal. The court denied the motion to dismiss but stated "[t]he parties may address the issue of timeliness of the notice of appeal in their briefs." *See* (Ct. App. Order dated April 4, 2019). The plaintiffs then filed their initial respondent's brief and argued, among other things, that the Court of Appeals lacked jurisdiction over this appeal. Builders responded to the plaintiffs' arguments in its initial reply brief. After completion of the final briefs and record on appeal, the Court of Appeals scheduled oral argument for March 3, 2021. On February 24, 2021—five days before oral argument—the Court of Appeals notified the parties that oral argument was canceled and that the case would be submitted on the record on appeal and briefs during the March 2021 term. The Court of Appeals issued an order dismissing the appeal on March 15, 2021, finding (1) Builders "was required to either move for reconsideration of the [*nunc pro tunc*] order within ten days after receipt, by October 10, 2016, or appeal the [*nunc pro tunc*] order within thirty days after receipt, by October 28, 2016"; (2) Builders stated that following the production of the requested settlement documents it "would move to seek a determination on set-off" but "never filed its subsequent set-off motion or any further briefing as to its entitlement to a set-off"; and (3) Builders' "second JNOV motion was a successive JNOV motion that was a nullity in the eyes of the law and did not suspend the time for appeal." *See* (Substituted Dismissal Order filed June 15, 2021).

Builders filed a petition for rehearing arguing the court erred in dismissing the appeal. The Court of Appeals denied the petition for rehearing but substituted a new order of dismissal, which only deleted a citation to *Wright v. Craft*[6] but left the remainder of the original order unchanged.

Argument

Builders' appeal is timely. Builders filed a timely setoff motion and properly appealed the denial of its setoff rights. The Court of Appeals' holding to the contrary contains three primary errors. First, the Court of Appeals erred in finding Builders never moved for setoff. Second, contrary to the Court of Appeals' finding, the *nunc pro tunc* order has no significance to the timeliness of Builders' appeal. Finally, even if Builders' September 8 motion is deemed not to be a motion for setoff, Builders' November 18, 2016 oral setoff motion was timely and made while jurisdiction remained vested in the trial court.

I. Builders timely served its notice of appeal after the trial court denied Builders' setoff rights.

Builders timely appealed the trial court's erroneous denial of Builders' statutory and equitable setoff rights. The Court of Appeals' dismissal on the ground that Builders never moved for setoff, and was therefore required to appeal within thirty days after receiving the *nunc pro tunc* order, is factually and legally incorrect and deprives Builders of its right to setoff and its right to appellate review.

The Court of Appeals' finding that Builders never moved for setoff is erroneous in two respects: (1) Builders in fact moved for setoff multiple times, and (2) Builders' right to setoff arises by operation of law even in the absence of a motion. The Court of Appeals' failure to recognize these factual and legal points infected its entire jurisdictional analysis.

[6] 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (addressing issue preservation).

A. Builders moved for setoff.

Builders filed its written motion titled "Defendant's Notice of Motion and Motion to Compel and Motion for Determination of Setoff" seven days after the verdict. (R. 4492–93). The motion sought to compel Plaintiffs to produce settlement information so the trial court and parties could calculate the required setoff and stated, "Thereafter, pursuant to S.C. Code § 15-38-50, [Builders] will seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury." (R. 4493). Although the last sentence may be inartfully worded, it was clear from the motion that Builders was seeking a setoff. (*Id.*). The Court of Appeals' construction of the motion as only a motion to compel containing a meaningless forecast of a future setoff motion is hypertechnical and unjust, and the resulting dismissal of Builders' appeal based on that hypertechnical interpretation is inconsistent with this Court's policy that cases should be decided on the merits rather than on technicalities. *See Patton v. Miller*, 420 S.C. 471, 493, 804 S.E.2d 252, 263 (2017) ("It is too late in the day and entirely contrary to the spirit of the . . . Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The . . . Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 181–82 (1962))); *see also Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649 n.3, 817 S.E.2d 273, 277 n.3 (2018) (noting in the issue preservation context that the Court "discourage[es] a hypertechnical application' of those rules resulting in appellate arguments being procedurally barred"). Neither the plaintiffs nor the trial court could claim in good faith they lacked notice that Builders sought a setoff, and the trial court even scheduled and held two hearings on the issue.

Regardless, any technical deficiency in Builders' September 8 motion was cured by Builders' subsequent setoff motions. Motions are not required to be made in writing and filed with the clerk; they may be made in writing ***or*** orally in open court with a court reporter present. Rule 7(b)(1), SCRCP. Two months after Builders' initial setoff motion, on November 17, 2016, Builders served and filed a memorandum in support of its motion. (R. 4581). The memorandum expressly requested that the trial court grant the motion and set off the amounts Plaintiffs received in settlement from codefendants, and it stated the statutory and equitable grounds for that request. (R. 4581–86). The South Carolina Rules of Civil Procedure require only that a written application for a court order "state with particularity the grounds therefor, and . . . set forth the relief or order sought." Rule 7(b)(1), SCRCP. To the extent the original September 8 motion is somehow deemed not to be a motion for setoff, the November 17 memorandum requests setoff in the manner required by Rule 7. Moreover, at a hearing the following day, in open court with a court reporter present, Builders' counsel orally moved for setoff "to the extent it is not deemed to have been made." (R. 774–75). The November 18 oral motion was, as a matter of law, a proper oral setoff motion. *See* Rule 7(b)(1), SCRCP. Accordingly, the Court of Appeals' finding that Builders "never filed its subsequent set-off motion or any further briefing at to its entitlement to a set-off" is factually and legally wrong.

This error is a foundation of the Court of Appeals' dismissal order. By starting its analysis with a finding that Builders never moved for setoff, the Court of Appeals set itself on a path to adopting the trial court's erroneous ruling that Builders failed to file a timely setoff motion and, by extension, was required to serve its notice of appeal within thirty days after receiving the *nunc pro tunc* order.

The time for Builders to move to alter or amend (or to appeal) the denial of its right to setoff did not begin to run until the trial court denied its right to setoff on November 16, 2017, when the trial court entered a written order denying Builders' setoff motions. (R. 26–44). In the November 16, 2017 order, the trial court stated for the first time a rationale that Builders' setoff motion was untimely, among other things. (R. 29–31). Builders timely filed a motion to alter or amend the order denying setoff within ten days after receiving written notice of entry of that order, thus staying the time to appeal that order.[7] (R. 4624–48); *see also* 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."); Rule 203(b)(1), SCACR ("When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."). The trial court entered a written order denying Builders' motion to alter or amend on June 27, 2018, and Builders received written notice of the order on June 28, 2018. (R. 45). Builders served its notice of appeal the next day, on June 29, 2018. Accordingly, Builders timely served its notice of appeal.

B. Regardless of whether Builders properly moved for setoff, its setoff rights arise by operation of law and it timely appealed the denial of those rights.

Builders' appeal was timely regardless of whether its September 8, 2016 motion is deemed a motion for setoff. Builders' setoff rights arise by operation of law, *Ellis v. Oliver*, 335 S.C. 106, 110, 112, 515 S.E.2d 268, 270, 271 (Ct. App. 1999) (addressing the question "whether the set-off required pursuant to § 15–38–50 arises by operation of law or must the party entitled to the set-off

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[7] Builders did not receive written notice of the trial court's order until November 27, 2017. *See* (R. 4624).

make a timely motion pursuant to the rules of civil procedure" and finding the setoff arose by operation of law), and Builders was not required to move for setoff at any particular time, *Ellis*, 335 S.C. at 110, 515 S.E.2d at 270 (noting the setoff statute, section 15-38-50, "does not require that the rights thereunder be asserted at any particular juncture in the litigation"); *see also Tilley v. Pacesetter Corp.*, 355 S.C. 361, 376–77, 585 S.E.2d 292, 300 (2003) (rejecting an argument that a setoff motion came too late). Hence, Builders' setoff motion cannot be untimely as a matter of law.

Even to the extent the September 8, 2016 motion is deemed ***not*** to be a motion for setoff, the September 12 motion must be construed as a timely Rule 59(e) motion to reconsider which stayed the time to appeal and sustained the trial court's jurisdiction, and thus rendered the November 18, 2016 oral motion a timely setoff motion made while the trial court had jurisdiction. *See* Part III, *supra*. Further, as explained below, the trial court's jurisdiction was otherwise sustained because the September 8 motion should be not be considered a nullity. The result of trial court's and Court of Appeals' ruling 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, it forever loses its setoff rights and any right to appeal the denial of a setoff. This inequitable result is inconsistent with South Carolina precedent. *See Tilley*, 355 S.C. at 376–77, 585 S.E.2d at 300; *Ellis*, 335 S.C. at 110, 112, 515 S.E.2d at 270, 271; *see also 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. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012).

A straightforward analysis of the procedural history of Builders' setoff request compels a finding that Builders timely appealed the setoff ruling and, therefore, the appellate courts have jurisdiction over this appeal. On these grounds alone, this Court should grant certiorari, reverse the Court of Appeals and reinstate this appeal, and either address the merits of Builders' appeal or remand the case to the Court of Appeals for consideration of the merits. However, the Court of Appeals also erred in analyzing that procedural history and compounded its error by misconstruing the trial court's *nunc pro tunc* order and finding, contrary to this Court's precedent, that Builders' September 12 motion was a "nullity." This Court should vacate the Court of Appeals' erroneous analysis of the *nunc pro tunc* order and the September 12 motion and find that, even if the September 8 motion is deemed not a motion for setoff, the subsequent oral setoff motion was timely.

II. The Court of Appeals misconstrued the *nunc pro tunc* order and the significance of its timing.

The Court of Appeals treated September 27, 2016—the date on which Builders received written notice that the trial court entered the *nunc pro tunc* order—as the date which triggered Builders' obligation to file a motion to reconsider or to serve a notice of appeal. According to the Court of Appeals, because Builders did not file a motion to reconsider the "final order" by October 10, 2016, and did not "appeal the final order" by October 28, 2016, Builders' appeal was untimely. The Court of Appeals' ruling is erroneous.

The Court of Appeals did not explain why it relied on September 27, 2016, as the date triggering Builders' deadline to move to reconsider or serve its notice of appeal. Contrary to the court's ruling, however, September 27 has no significance to the timeliness of this appeal. Builders

could not have moved to reconsider or appealed the trial court's setoff ruling in October 2016 because the trial court had not made a setoff ruling at that time. As explained above, the trial court did not deny Builders' setoff rights until November 16, 2017.

The date on which Builders received written notice of the *nunc pro tunc* order has significance only if the physical entry of the *nunc pro tunc* order on September 22 is construed as denying Builders' pending September 8 motion for setoff and September 12 motion. Such a construction, however, is an incorrect interpretation and application of the unambiguous *nunc pro tunc* order. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) ("As a general rule, judgments are to be construed like other written instruments. . . . If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used."); *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) (same).

The jury rendered its verdict on September 1, 2016. (R. 739–40). On that same day, Builders made an oral JNOV motion, which the trial court immediately denied. (R. 748). Although Rule 58(a)(1) of the South Carolina Rules of Civil Procedure provides that a judgment must "forthwith" be entered upon a jury's verdict, neither the clerk nor the trial court entered a judgment immediately after the verdict. Instead, three weeks later—after Builders had filed both its September 8 setoff motion and its September 12 motion for JNOV, new trial, or new trial *nisi remittitur*—the trial court signed a Form 4 order on September 22, 2016, but dated the order "9-1-2016 nunc pro tunc." (R. 22–23). This unambiguous form judgment was the "separate document" that should have been entered following the jury's verdict on September 1, 2016. *See* Rule 58(a),

SCRCP ("Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.").

The trial court was, on September 22, 2016, correcting this omission *nunc pro tunc* with the Form 4 order, which it dated to be effective as if it had been entered on September 1, 2016, as required by Rule 58. *See Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) ("*Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect."); *see also Irving v. Irving*, 67 So. 3d 776, 780 (Miss. 2011) (finding the effective date of an order was the *nunc pro tunc* date in the order, not the date the order was signed); *Daniels v. Comm'n for L. Discipline*, 142 S.W.3d 565, 573 (Tex. App. 2004) ("A nunc pro tunc judgment, although signed later, relates back to the date of the original judgment ***and is effective as of the earlier date***." (emphasis added)); *Hinkle v. Woolever*, 547 S.E.2d 782, 784 n.1 (Ga. Ct. App. 2001) ("[T]he nunc pro tunc entry made the divorce and the award of the policy to Mr. Hinkle effective as of that date."). Thus, the September 22, 2016 signed order, on its face, is unambiguously a *nunc pro tunc* judgment retroactive to September 1, 2016, which accomplished only what the trial court and clerk were required by law to do on September 1, 2016: enter judgment on the jury's verdict. *See* Rule 58, SCRCP ("[U]pon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, *the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court*." (emphasis added)). (R. 22–23).

The *nunc pro tunc* order effective ***September 1*** did not deny—and could not have denied—Builders' ***September 8*** setoff motion (or any subsequent setoff motion) or ***September 12*** motion because the motions had not yet been filed. Regardless of when the *nunc pro tunc* order was signed or received, it cannot affect motions filed ***after*** September 1, 2016. The clerk's and trial court's

failure to formally enter the judgment until three weeks after the verdict did not change the nature of the judgment, and the *nunc pro tunc* order did not address or deny Builders' pending post-trial motions, including its motion for setoff.

Moreover, months later, the trial court considered substantial amounts of additional briefing and held two hearings regarding Builders' September 8 setoff motion and September 12 post-trial motion. The trial court would not have expended these resources had it already ruled on the motions via the *nunc pro tunc* order it signed on September 22, 2016. The trial court held the hearings because it had *not* addressed the motions.

Finally, a trial court cannot grant or deny setoff until it reviews the settlement documents "to determine the amount of the settlement and its terms." *Huck*, 422 S.C. at 438, 813 S.E.2d at 292. The trial court in this case did not order the plaintiffs to produce their settlement agreements until a hearing on April 20, 2017, at which the trial court heard additional argument on Builders' setoff motion. (R. 869–73). The trial court had not reviewed the settlement documents when it signed the *nunc pro tunc* order on September 22, 2016, and therefore also could not have denied Builders' setoff motion on the merits at that time for this separate reason. Further, the trial court ultimately *granted* the motion to compel production of settlement documents at the April 20, 2017 hearing, *see* (R. 869–73), so any finding by the Court of Appeals that the September 22, 2016 *nunc pro tunc* order *denied* the pending motion to compel and for determination of setoff is inconsistent with the trial court's rulings and the procedural history of the setoff issue.

The Court of Appeals' reliance on the *nunc pro tunc* order as the event triggering the deadline to appeal or move to reconsider is a factual and legal error and is inconsistent with South Carolina law and the unambiguous language of the *nunc pro tunc* order.

III. Builders' "second JNOV motion" was not a nullity.

The Court of Appeals further erred and has misapplied this Court's precedent in adopting the trial court's finding that Builders' September 12 motion for JNOV or a new trial was a "successive JNOV motion" and a "nullity in the eyes of the law." The trial court and Court of Appeals relied on this Court's opinion in *Elam v. South Carolina Department of Transportation*—which held filing a first written Rule 59(e) motion followed by a successive ***written, duplicative Rule 59(e) motion*** is improper—and failed to apply binding precedent established in *Fields* addressing the same scenario at issue here.

Builders' September 12, 2016 motion is properly construed as a Rule 59(e) motion to reconsider and should be construed as properly pending before the trial court. The trial court referenced the September 12 motion—calling it a "nullity"—in a footnote in its November 16, 2017 order, but it never ruled on the motion. (R. 31 n.3). Builders has correctly maintained thereafter that the trial court should rule on the motion and not treat it as a nullity. The Court of Appeals' dismissal order adopting the trial court's finding that the motion is a nullity is likewise in error and conflicts with this Court's precedent.

South Carolina courts do not rely on the label a litigant places on a motion in determining its effect. Instead, courts look to the substance of the motion to determine the requested relief. *Fields*, 363 S.C. at 27–28, 609 S.E.2d at 510 (collecting cases emphasizing courts must look to the substance and effect of a motion and the relief requested, rather than to the label or form of the motion). Accordingly, the fact that Builders initially labeled its September 12, 2016 motion as a "Motion for Judgment, New Trial Absolute, or, in the Alternative, for New Trial *Nisi Remittitur*," (R. 4494), does not determine that the motion was an improper motion. *See Fields*, 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."). Rather, the courts must look at the substance of the motion.

This Court addressed this exact scenario in *Fields*. The losing litigant in *Fields* made a simple oral motion for a new trial after the jury's verdict, and the trial court orally denied the motion. 363 S.C. at 26, 609 S.E.2d at 509–10. The litigant then filed a written new trial motion within ten days after the verdict. *Id.* at 26–27, 609 S.E.2d at 510. In addressing a challenge to its appellate jurisdiction, this Court held the written motion was "properly viewed as a motion for reconsideration under Rule 59(e), SCRCP to the extent it addressed the trial court's evidentiary rulings which Plaintiff challenged in her briefly stated oral motion at the end of the trial, . . . *even though it was erroneously captioned as a motion for new trial*." *Id.* at 27, 609 S.E.2d at 510 (emphasis added). *Fields* thus mandates that a second, written JNOV motion filed after the oral denial of an oral post-trial motion raising the same grounds is properly viewed as a Rule 59(e) motion, which stays the time to appeal. *See id.*; Rule 203(b)(1), SCACR.

In ruling otherwise, the Court of Appeals applied the same incorrect rationale it applied in *Matthews v. Richland County School District One*, 357 S.C. 594, 597–600, 594 S.E.2d 177, 178–80 (Ct. App. 2004), which this Court has previously overruled. In *Matthews*, the Court of Appeals held a first, written Rule 59(e) motion raising the identical grounds raised in a previous, oral JNOV/new trial motion was an improper, successive post-trial motion which did not stay the time to appeal. *Id.* This Court expressly overruled *Matthews* in *Elam*. *Elam*, 361 S.C. at 26, 602 S.E.2d at 781.

This Court identified two narrow exceptions to the general rule that a Rule 50 or 59 motion stays the time to appeal: (1) "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"; and (2) "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***." *Id.* at 20, 602 S.E.2d at 778 (emphases added). Neither of these exceptions apply here.

The Court drew a distinction between successive *written* post-trial motions raising identical grounds and a single written post-trial motion which follows, and raises identical grounds as, an *oral* post-trial motion. *Elam*, 361 S.C. at 19–20, 602 S.E.2d at 777–78. The Court rejected the exact rationale applied by the trial court and Court of Appeals here, stating: "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 time for appeal." *Id.* at 21, 602 S.E.2d at 778 (emphases added). Further, this Court held parties usually are "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," subject only to the two narrow exceptions identified above. *Id.*

The Court emphasized allowing a party one opportunity to seek reconsideration of the arguments raised in its initial JNOV motion ensures fairness and justice. *Id.* at 22, 602 S.E.2d at 779; *see also id.* at 23, 602 S.E.2d at 779 ("It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial." (quoting 11 Wright, Miller & Kane § 2801)). In fact, refusing to allow such a request for reconsideration—as the trial court and Court of Appeals have done in this case—is inherently ***unfair***. *Id.* ("There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised

argument. It is inherently unfair to disallow such an opportunity."). This rationale "holds true even when a party mislabels a post-trial motion." *Id.*

The Court of Appeals' dismissal order is thus in conflict with two prior decisions of this Court. *See* Rule 242(b)(3), SCACR (providing "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court" as a reason supporting a writ of certiorari). Pursuant to *Elam* and *Fields*, a party is entitled to make both an oral JNOV motion immediately after the verdict *and* a subsequent, written motion raising the same grounds and asking the trial court to reconsider its JNOV ruling, regardless of how it labels the motion. *Elam*, 361 S.C. at 21, 602 S.E.2d at 778; *Fields*, 363 S.C. at 26–27, 609 S.E.2d at 509–10. Builders did exactly that. Builders' labeling the motion as a "Motion for Judgment, New Trial Absolute, or, in the Alternative, for New Trial *Nisi Remittitur*" is immaterial. *See id.* Like the appellant's motion in *Fields*, the substance and effect of Builders' motion seeks reconsideration of the trial court's denial of Builders' oral JNOV motion. The courts must rely on that substance and effect, not the label affixed to the caption.

A proper application of *Elam* and *Fields* requires a finding that the September 12 motion was not a nullity, and should not have been treated as a nullity. Rather, it should have been addressed on the merits by the trial court. When the trial court finally rules on the motion—which this Court should order it to do because the motion is not a nullity—Builders will be entitled to appeal the ruling and any intermediate judgment or order not yet appealed. S.C. Code Ann. § 14-3-330(1).

Conclusion

The Court of Appeals erred in dismissing Builders' appeal on the ground that Builders failed to timely serve its notice of appeal. Builders properly moved to alter or amend the trial

court's November 16, 2017 denial of Builder's setoff rights, which stayed the time to appeal. Builders then timely served its notice of appeal within thirty days after the trial court denied its motion to alter or amend. The appellate courts have jurisdiction over this appeal. This Court should vacate the dismissal order because it is inconsistent with this Court's precedent and deprives Builders of its right to appellate review, and the Court should either consider the merits of Builders' appeal or direct the Court of Appeals to do so, including instructing the Court of Appeals to direct the trial court to consider the written motion requesting reconsideration of the oral JNOV motion.

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